This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 568 417

Digitized by Google

HARVARD LAW LIBRARY

Received DEC 1 1914

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

OF THE

STATE OF MISSOURI

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

December 2 to December 31, 1913,

By THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

April 6 to May 4, 1914,

By JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

April 14 to April 23, 1914,

By MORRISON PRITCHETT of the Webb City Bar.

OFFICIAL REPORTERS.

VOL. 179.

E. W. STEPHENS PUBLISHING CO.
COLUMBIA, MO.

Digitized by Google

Entered according to Act of Congress, in the year 1914, by

E. W. STEPHENS,

In the office of the Librarian of Congress at Washington, D. C.

DEC 17 1914

Digitized by Google

JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. GEORGE D. REYNOLDS, *Presiding Judge.*
HON. ALBERT D. NORTONI, } *Judges.*
HON. WILLIAM H. ALLEN, }
JOSEPH FLORY, *Clerk.*
THOMAS E. FRANCIS, *Reporter.*

JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

HON. JAMES ELLISON, *Presiding Judge.*
HON. JAMES M. JOHNSON, } *Judges.*
HON. FRANCIS H. TRIMBLE, }
L. F. McCOY, *Clerk.*
JOHN M. CLEARY, *Reporter.*

JUDGES OF THE

SPRINGFIELD COURT OF APPEALS.

HON. WILLIAM R. ROBERTSON, *Presiding Judge.*
HON. JOHN T. STURGIS, } *Judges.*
HON. JOHN S. FARRINGTON, }
GEORGE H. DANIEL, *Clerk.*
MORRISON PRITCHETT, *Reporter.*

Digitized by Google

CASES REPORTED.

(Cases are inserted in the order received by publisher.)

A

American Fire Clay Company, Hay v. 567
American Manufacturing Company, Zachra v. 683
American Zinc, Lead and Smelting Company, Conklin v. 419
Anderson, International Text Book Company v. 631
Annan-Burg Milling Company, Iroquois Manufacturing Company v. 87

B

Bambrick Brothers Construction Company, Sustar v. 495
Bange v. Supreme Council of Legion of Honor of Missouri. 21
Barnes, Hardwicke v. 386
Best v. City of St. Joseph. 330
Boehm v. General Electric Company. 663
Boner v. Nicholson. 146
Browning, City of, Willis v. 233

C

Central Coal and Coke Company, Goode v. 207
Century Realty Company v. Frankfort Marine, Accident and Plate Glass Insurance Company. 123
Century Realty Company v. Travelers Insurance Company. 144
Century Realty Company v. Frankfort Marine, Accident and Plate Glass Insurance Company. 145
Chicago, Rock Island and Pacific Railway Company, Stark v. . . . 225
Chilton v. Harris. 267
City of Browning, Willis v. 233
City of St. Joseph, Best v. 330
Clarkson v. Garvey. 9
Clymer, Heisler v. 110
Columbia Taxicab Company, Fornoff v. 620
Columbia Taxicab Company, Van Hoeffen v. 591
Conklin v. American Zinc, Lead and Smelting Company. 419
Corley Publishing and Promotion Company, Meyer v. 695
Cornell v. Mutual Life Insurance Company. 420
Cottengin, Pittsburg Steel Company v. 392
Creamer, Davis v. 374
Curtis v. Stix, Baer and Fuller Dry Goods Company. 578
Cushing v. Petrie. 326

Digitized by Google

D

Davis v. Creamer 374
Davis v. McColl 198
Delano, Smith v 242
Demuth, Easton v 722
Dorfman, Furniture Hospital v 302
Doubikin, Gray v 240
Dunham v. Philadelphia Casualty Company 558

E

Easton v. Demuth 722
Enright, Valleroy v 553

F

Flick, State ex rel. Schenk v 236
Fornoff v. Columbia Taxicab Company 620
Frankfort Marine, Accident and Plate Glass Insurance Company, Century Realty Company v 123
Frankfort Marine, Accident and Plate Glass Insurance Company, Century Realty Company v 145
Fritch, Administratrix v. Fritch 434
Fritch, Fritch, Administratrix, v 434
Freudenstein, Laclede Laundry Company v 175
Furniture Hospital v. Dorfman 302

G

Garvey, Clarkson v 9
General Electric Company, Boehm v 663
George, Administrator v. Quincy, Omaha and Kansas City Railroad Company 283
German Commercial Accident Company, Mitchell v 1
Gibson, Guardian v. Pollock 188
Goddard Grocer Company, Patton-Worsham Grocer Company v .. 676
Goller v. Henseler Mercantile Oil and Supply Company 48
Goode v. Central Coal and Coke Company 207
Gray v. Doubikin 240
Gray v. Wabash Railroad Company 541

H

Haller, Meux v 466
Hammond Brothers, Wilt v 406
Hardwicke v. Barnes 386
Harris, Chilton v 267
Hay v. American Fire Clay Company 567
Heffron, In re 639
Heisler v. Clymer 110
Henseler Mercantile Oil and Supply Company, Goller v 48
Higbee v. Western Union Telegraph Company 195

Digitized by Google

I

In re Estate of Fritch..... 434
In re Heffron..... 639
International Text Book Company v. Anderson..... 631
Iroquois Manufacturing Company v. Annan-Burg Milling Company..... 87

J

Johnson, State v..... 344

K

Kansas City Masonic Temple Company v. Young..... 278
Kansas City, Robinson v..... 211
Keily v. Knights of Father Matthew..... 608
Kelley v. Morton..... 296
Knights of Father Matthew, Keily v..... 608

L

Laclede Laundry Company v. Freudenstein..... 175
Lasar Manufacturing Company v. Pelligreen Construction and Investment Company..... 447
Lazerine v. Lazerine..... 476
Lazerine, Lazerine v..... 476
Leonard v. Security Building Company..... 480
Lewis and Lewis, Administrators v. Smith..... 348
Love v. Scott..... 351
Lowenstein and Lowenstein, Administrators v. Old Colony Life Insurance Company..... 364
Lutz, Reeves v..... 61

Mc

McColl, Davis v..... 198
McConnell, Ray, Administrator v..... 400

M

Metropolitan Street Railway Company, Speaks v..... 311
Meux v. Haller..... 466
Meyer v. Corley Publishing and Promotion Company..... 695
Minea v. St. Louis Cooperage Company..... 705
Minor v. Woodward..... 333
Mitchell v. German Commercial Accident Company..... 1
Morton, Kelley v..... 296
Mutual Life Insurance Company, Cornell v..... 420

Digitized by Google

N

Nicholson, Boner v. 146
Northern Central Coal Company, Ronchetto v. 215

O

Old Colony Life Insurance Company, Lowenstein and Lowenstein, Administrators v. 364
Olive Street Bank of St. Louis v. Phillips. 488
Osborn v. Wabash Railroad Company. 245

P

Patton-Worsham Drug Company v. Goddard Grocer Company. 676
Pelligreen Construction and Investment Company, Lasar Manufacturing Company v. 447
Pendegrass v. St. Louis and San Francisco Railroad Company. 517
Petrie, Cushing v. 326
Philadelphia Casualty Company, Dunham v. 558
Phillips, Olive Street Bank of St. Louis v. 488
Pittsburg Steel Company v. Cottengin. 392
Polar Wave Ice and Fuel Company, Small v. 456
Pollock, Gibson, Guardian v. 188
Powell, State v. 7

Q

Quincy, Omaha and Kansas City Railroad Company, George, Administrator v. 283

R

Rackliffe-Gibson Construction Company v. Zeilda Forsee Investment Company. 229
Ray, Administrator v. McConnell. 400
Reed, St. Louis Sanitary Company v. 164
Reeves v. Lutz. 61
Roberts and Roberts v. Trunk. 358
Robinson v. Kansas City, Missouri, 211
Ronchetto v. Northern Central Coal Company. 215

S

St. Joseph, City of, Best v. 330
St. Louis Cooperage Company, Minea v. 705
St. Louis and San Francisco Railroad Company, Pendegrass v. 517
St. Louis Sanitary Company v. Reed. 164
Schroeder Wine and Liquor Company v. Willis Coal and Mining Company. 93

Digitized by Google

Schroeder Wine and Liquor Company v. Willis Coal and Mining Company..... 107
Schroeder Wine and Liquor Co. v. Willis Coal and Mining Co... 108
Schroeder v. Willis Coal and Mining Company..... 109
Scott, Love v..... 351
Security Building Company, Leonard v..... 480
Small v. Polar Wave Ice and Fuel Company..... 456
Smith v. Delano..... 242
Smith, Lewis and Lewis, Administrator v..... 348
Snyder v. Toler..... 376
Speaks v. Metropolitan Street Railway Company,..... 311
Stamper, Trimble v..... 300
Stark v. Chicago, Rock-Island and Pacific Railway Company..... 225
Stix, Baer and Fuller Dry Goods Company, Curtis v..... 578
Supreme Council Legion of Honor of Missouri, Bange v..... 21
Sustar v. Bambrick Brothers Construction Company..... 495

STATE

State v. Johnson..... 344
State v. Powell..... 7
State ex rel. Schenk v. Flick..... 236
State ex rel. Wiseman v. Urton..... 264

T

Thompson v. White Sewing Machine Company..... 276
Toler, Snyder v..... 376
Travelers Insurance Company, Century Realty Company v..... 144
Trimble v. Stamper..... 300
Trunk, Roberts and Roberts v..... 358

U

United Railways Company, Yawitz v..... 718
Urton, State ex rel. Wiseman v..... 264

V

Valleroy v. Enright..... 553
Van Hoeffen v. Columbia Taxicab Company..... 591

W

Wabash Railroad Company, Osborn v..... 245
Wabash Railroad Company, Gray v..... 541
Western Union Telegraph Company, Higbee v..... 195
White Sewing Machine Company, Thompson v..... 276
Willis Coal and Mining Company, Schroeder Wine and Liquor Company v..... 93

Digitized by Google

Willis Coal and Mining Company, Schroeder Wine and Liquor Company v..... 107
Willis Coal and Mining Co., Schroeder Wine and Liquor Co. v.. 108
Willis Coal and Mining Company, Schroeder v..... 109
Willis v. City of Browning..... 233
Wilt v. Hammond Brothers..... 406
Woodward and Wood, Minor v..... 333

Y

Yawitz v. United Railways Company..... 718
Young, Kansas City Masonic Temple Company v..... 278

Z

Zachra v. American Manufacturing Company..... 683
Zeilda Forsee Investment Company, Rackliffe-Gibson Construction Company v..... 229

Digitized by Google

CASES CITED.

A

Adams v. Ellis, 86 Mo. App. 343 375
Adcox v. Telegraph Co., 171 Mo. App. 331 198
Alcorn v. R. R., 108 Mo. 81 714
Aldridge v. Spears, 101 Mo. App. 527 265
Allen v. Lumber Co., 171 Mo. App. 492 506
Ames v. Gilmore, 59 Mo. 537 280

B

Backer v. R. R., 240 Mo. 507 673
Bailey v. Buchanan, 126 Mo. App. 190 276
Bailey v. Culver, 84 Mo. 531 654
Bailey v. Kansas City, 189 Mo. 503 714
Baker v. Cunningham, 162 Mo. 134 194
Banchor v. Gregory, 9 Mo. App. 102 104
Bange v. Supreme Council, 128 Mo. App. 461....27, 40, 42, 43, 45, 46
Bange v. Supreme Council, 153 Mo. App. 154....27, 40, 42, 43, 45, 46
Bank v. Commission Co., 195 Mo. 262 171
Bank v. Cooper, 85 Mo. App. 383 201
Bank v. Dankmeyer, 70 Mo. App. 168 350
Bank v. Dowler, 163 Mo. App. 68 465
Bank v. Fudge, 109 Mo. App. 186 92
Bank v. Gay, 63 Mo. 33 201
Bank v. Leyser, 116 Mo. 51 137
Bank v. Lillard, 55 Mo. App. 675 350
Barlow v. Trorlight, 49 Mo. App. 214 539
Barnes v. Waltke Co., 135 Mo. App. 488 102
Battles v. M. Rys. Co., 178 Mo. App. 596 553
Baxter v. Transit Co., 198 Mo. 1 192
Beck v. R. R., 129 Mo. App. 7 631
Beile v. Protective Assn., 155 Mo. App. 629 138
Bent v. Priest, 86 Mo. 475 121
Bennet v. R. R., 122 Mo. App. 703 263
Bertig-Smythe v. Lumber Co., 112 Mo. App. 259 399
Berrymore v. Becker, 173 Mo. App. 346 403
Bidwell v. Ins. Co., 40 Mo. 42 432
Blum v. Ins. Co., 197 Mo. 513 429
Bond v. Sandford, 134 Mo. App. 477 575
Bonner v. Lisenby, 86 Mo. App. 666 473
Borders v. Barber, 81 Mo. 636 139
Borders v. Sedalia, 161 Mo. App. 633 551

Digitized by Google

Borgraff v. Supreme Lodge, 26 Mo. App. 218..... 616
Bowens v. Benson, 57 Mo. 26..... 277
Bowman v. Mining Co., 168 Mo. App. 707..... 221
Boyd v. R. R., 236 Mo. 54..... 362
Boyd v. R. R., 249 Mo. 110..... 362
Bragg v. St. R. R., 192 Mo. 331..... 82
Brands v. Car Co., 213 Mo. 698..... 515
Briscoe v. Hide, 75 Mo. App. 288..... 403
Brennan v. St. Louis, 92 Mo. 482..... 488
Brosus v. Lead and Zinc Co., 149 Mo. App. 181..... 321
Brown v. Carson, 132 Mo. App. 371..... 403
Brown v. Morgan, 56 Mo. App. 382..... 184
Browning v. R. R., 124 Mo. 55..... 86
Bruce v. U. Rys. Co., 175 Mo. App. 568..... 86
Bryant v. McCune, 49 Mo. 547..... 442
Burge v. R. R., 224 Mo. 76.....257, 262
Burnes v. Patrick, 27 Mo. 434..... 292

C

Cabanne v. Car Co., 178 Mo. App. 718..... 533
Callan v. Callan, 175 Mo. 346..... 120
Campbell v. Boyers, 241 Mo. 421..... 475
Campbell v. Clark, 44 Mo. App. 249..... 272
Canterbury v. Kansas City, 130 Mo. App. 1..... 20
Carey v. Schmeltz, 221 Mo. 132..... 104
Carrollton, Town of, v. Rhomberg, 78 Mo. 547..... 483
Cashion v. Faina, 47 Mo. 133..... 270
Casualty Co. v. Kacer, 169 Mo. 301..... 429
Chandler v. R. R., 251 Mo. 592..... 292
Charcoal Co. v. Lewis, 154 Mo. App. 548..... 350
Chillicothe v. Henry, 136 Mo. App. 472..... 231
Childs v. R. R., 117 Mo. App. 414..... 292
Choteau v. Allen, 70 Mo. 290..... 201
Chrismer v. Telephone Co., 194 Mo. 208..... 375
City of St. Louis v. Gloner, 210 Mo. 502.....659, 661
Clark v. Cooper, 148 Mo. App. 230..... 271
Clarkson v. Laiblan, 178 Mo. App. 708..... 649
Clouts v. Gaslight Co., 160 Mo. App. 456..... 714
Club v. Horchitz et al., 168 Mo. App. 35..... 92
Coffee v. City of Carthage, 186 Mo. 585..... 551
Cohn v. Kansas City, 108 Mo. 185..... 551
Coin v. Lounge Co., 222 Mo. 506..... 515
Coleman v. Cole, 158 Mo. 253..... 391
Coleman v. Roberts, 214 Mo. 634..... 397
Connor v. Nevada, 188 Mo. 148..... 214
Conqueror Zinc and Lead Co. v. Ins. Co., 152 Mo. App. 332..... 134
Coontz v. R. R., 115 Mo. 669..... 539
Cooper v. Scoyoc, 104 Mo. App. 414..... 102
Corby v. Corby, 85 Mo. 393..... 384
Corder v. O'Neill, 207 Mo. 632..... 703

Digitized by Google

Couch v. Kansas City, 127 Mo. 137..... 272
Crawford v. Stock Yards Co., 215 Mo. 394.....426, 428
Crayton v. Huntzinger, 163 Mo. App. 718..... 464
Creasy v. Gray, 88 Mo. App. 454..... 201
Crow v. Crow, 124 Mo. App. 120..... 403
Crumpley v. R. R., 111 Mo. 152..... 257
Cullan v. R. R., 84 Mo. App. 347..... 83
Cummings v. Cummings, 51 Mo. 261..... 440
Cummings v. Hurd, 49 Mo. App. 139..... 473
Curran v. St. Joseph, 143 Mo. App. 618..... 214

D

Davis v. Meredith et al., 48 Mo. 263..... 103
Davis v. Vories, 141 Mo. 234..... 694
Decker v. Diemer, 229 Mo. 324..... 295
De Kalb Co. v. Dixon, 44 Mo. 341..... 244
De Steiger v. Hollington, 17 Mo. App. 382..... 702
Dickinson v. Jenkins, 144 Mo. App. 133..... 460
Distillery Co. v. Van Frank, 147 Mo. App. 204..... 473
Donahue v. R. R., 91 Mo. 357..... 257
Doss v. R. R., 59 Mo. 27..... 227
Downend v. Kansas City, 71 Mo. App. 529..... 214
Drolshagen v. R. R., 186 Mo. 262..... 381
Dugan v. Scott, 37 Mo. App. 663..... 191
Dunne v. R. R., 166 Mo. App. 372..... 197
Duyer v. Transit Co., 108 Mo. App. 152..... 601

E

Edmonston v. Jones, 96 Mo. App. 83..... 277
Electric Co. v. Steinberg Hat, etc. Co., 94 Mo. App. 543..... 638
Ellerbe v. Barney, 119 Mo. 632..... 616
Ellis v. Kreutzinger, 27 Mo. 311..... 431
Ely v. St. Louis, 181 Mo. 723..... 214
Ely v. R. R., 77 Mo. 34..... 713
English v. Seibert, 49 Mo. App. 563..... 351
English v. Shoe Co., 145 Mo. App. 439..... 460
Epstein v. Clothing Co., 67 Mo. App. 221..... 694
Eves v. Woodmen of the World, 153 Mo. App. 247..... 429
Ex parte Arnold, 128 Mo. 256..... 652
Ex parte Craig, 130 Mo. 590..... 652
Ex parte Creasy, 243 Mo. 679.....650, 651, 663
Ex parte Livingston, 12 Mo. App. 80..... 588
Ex parte Schull, 221 Mo. 623.....652, 663

F

Fairchild v. City of St. Louis, 97 Mo. 85..... 654
Farley v. Welch, 237 Mo. 128..... 239
Fillingham v. Transit Co., 102 Mo. App. 573..... 606

Digitized by Google

Fisher Co. v. Realty Co., 159 Mo. 562..... 492
Fitch v. R. R., 45 Mo. 327..... 294
Flanagan Mills Co. v. Grain Co., 115 Mo. App. 542..... 56
Flato v. Mulhall, 72 Mo. 522..... 203
Flynn v. Transit Co., 113 Mo. App. 185.....602, 606
Fontaine v. Bank, 57 Mo. 552..... 182
Fore v. R. R., 114 Mo. App. 557..... 551
Forrister v. Sullivan, 231 Mo. 345..... 471
Furber v. Bolt & Nut Co., 185 Mo. 311.....255, 427
Furnish v. R. R., 102 Mo. 669..... 85
Furstenfeld v. Furstenfeld, 152 Mo. App. 726..... 694

G

Gabriel v. St. R. R., 162 Mo. App. 56..... 464
Gaines & Co. v. Fruit & Wine Co., 107 Mo. App. 507..... 283
Gannon v. Gaslight Co., 145 Mo. 502.....81, 619
Gates v. R. R., 125 Mo. App. 334..... 631
George v. R. R., 249 Mo. 197..... 291
Gerdes v. Christopher & Simpson etc. Co., 124 Mo. 347.....615, 539
German v. Gilbert, 83 Mo. App. 411..... 415
Gibler v. R. R., 203 Mo. 222..... 537
Gilson v. Schull, 251 Mo. 480..... 192
Gildersleeve v. Overstolz, 90 Mo. App. 518..... 418
Girard v. Coal & Coke Co., 270 Mo. 242.....535, 537
Glardon v. Sup. Lodge, 50 Mo. App. 45..... 46
Glasscock v. Swofford, 106 Mo. App. 657..... 224
Glenn v. Gunn, 88 Mo. App. 445..... 442
Glover v. Henderson, 120 Mo. 367..... 172
Goddard v. Williamson, 72 Mo. 131.....402, 403
Godman v. Simmons, 113 Mo. 120..... 431
Goodloe v. R. R., 120 Mo. App. 202..... 539
Gould v. St. John, 207 Mo. 619.....18, 428
Grainger v. Still, 187 Mo. 197..... 74
Grath v. Roofing Co., 128 Mo. App. 245..... 414
Gray v. R. R., 157 Mo. App. 92..... 545
Grayson v. Transit Co., 100 Mo. App. 60..... 601
Greene v. Boaz, 47 S. W. 255..... 204
Green v. R. R., 115 Mo. App. 145..... 465
Green v. R. R., 192 Mo. 131..... 257
Griswold v. Haas, 145 Mo. App. 578.....471, 716
Grocer Journal v. Publishing Co., 127 Mo. App. 356..... 283
Grocery Co. v. Fidelity & Guarantee Co., 130 Mo. App. 421..... 139
Groneweg & Co. v. Estes, 144 Mo. App. 418..... 395
Gruwell v. Knight, 126 Mo. App. 496..... 365
Gutridge v. R. R., 105 Mo. 520..... 531

H

Haarstick v. Gabriel, 200 Mo. 237..... 392
Hadley v. Bernero, 103 Mo. App. 549..... 191

Digitized by Google

Hackett v. Van Frank, 105 Mo. App. 384 473
Hales v. Raines, 162 Mo. App. 46 ..... 74, 82
Hamilton Brown Shoe Co. v. Saxey, 131 Mo. 212 659
Hammell v. Weiss, 54 Mo. App. 16 486
Hannum v. Waddill, 135 Mo. 153 41
Hardware Co. v. Wolter, 91 Mo. 484 557
Hardwicke v. Barns, 253 Mo. 6 388
Harrison v. R. R., 50 Mo. App. 332 473
Hastings v. Myers, 21 Mo. 519 440
Haver v. Schwyhart, 48 Mo. App. 50 402
Hax v. Plaster Co., 82 Mo. App. 447 431
Hayden v. R. R., 124 Mo. 566 257
Hazlet v. Woodruff, 150 Mo. 540 203
Heard v. Slack, 81 Mo. 610 191
Hefferman v. Boteler, 87 Mo. App. 316 473
Henge v. R. R., 227 Mo. 636 263
Hennayde v. R. R., 45 Mo. 255 257
Henning v. Ins. Co., 47 Mo. 425 ..... 57, 60
Herdt v. Koenig, 137 Mo. App. 589 553
Hewitt v. Steele, 118 Mo. 463 17
Higgins v. Harvester Co., 181 Mo. 301 391
Higgins v. R. R., 197 Mo. 318 259
Hight v. Bakery Co., 168 Mo. App. 431 553
Hipsley v. R. R., 58 Mo. 348 713
Hirsch v. Freund Bros. Bread Co., 150 Mo. App. 162 673
Hodges v. Chambers, 171 Mo. App. 563 671
Hodkinson v. Machinery Co., 161 Mo. App. 87 472
Hofheimer v. Losen, 24 Mo. App. 652 301
Hogan v. Kaiser, 113 Mo. App. 711 350
Holden v. R. R., 108 Mo. App. 665 537
Holdrick v. Marsh, 28 Mo. App. 282 483
Houck v. R. R., 116 S. W. 559; 92 S. W. 738 465
Houston v. R. R., 129 Mo. App. 576 465
Howard v. Strader, 128 Mo. App. 495 486
Howland v. R. R., 134 Mo. 474 101
Huggart v. R. R., 134 Mo. 673 257
Huhn v. R. R., 92 Mo. 440 295
Hurley v. R. R., 57 Mo. App. 675 104
Hurst v. Van De Weld, 158 Mo. 239 381
Hutchinson v. Morris Bros., 190 Mo. 673 291
Hutchinson v. Safety Gate Co., 247 Mo. 71 676

I

Ice Co. v. Tamm, 138 Mo. 385 557
Ingalls v. R. R., 145 Mo. 247 539
Ittner v. St. Louis Exposition, etc., Co., 97 Mo. 561 556
Ives v. Kimlin, 140 Mo. App. 293 416

J

Jackson v. Fulton, 87 Mo. App. 228 244
Jackson v. R. R., 54 Mo. App. 636 179

Digitized by Google

Jackson v. Tel. Co., 156 S. W. 800 536
James v. R. R., 107 Mo. 480 227
Jamison v. Culligan, 151 Mo. 410 190
Jewel v. Bolt & Nut Co., 231 Mo. 176 515
Johnson v. Bank, 173 Mo. 171 391
Johnson v. W. R. R., 243 Mo. 278 121
Johnson v. Mining Co., 171 Mo. App. 134 295
Jordan v. Transit Co., 202 Mo. 418 281
Joyce v. R. R., 219 Mo. 374 325

K

Kaiser v. St. Louis, 185 Mo. 374 551
Karnes v. Winn, 126 Mo. App. 712 20
Keen v. R. R., 129 Mo. App. 301 ..... 601, 627
Keeton's Heirs v. Keeton, Adm., 20 Mo. 530 119
Kelly v. Lawrence, 195 Mo. 75 228
Kellogg v. Kirksville, 132 Mo. App. 519 464
Kelsay v. R. R., 129 Mo. 362 256
Kendricks v. Harris, 156 S. W. 490 465
Key v. Ins. Co., 101 Mo. App. 334, 351 431
King v. City of St. Louis, 250 Mo. 501 86
King v. R. R., 211 Mo. 1 673
Kirkpatrick v. R. R., 211 Mo. 68 464
Kneisley Lumber Co. v. Stoddard Co., 113 Mo. App. 306 399
Konta v. Stock Exchg., 189 Mo. 26 48
Koons v. Car Co., 203 Mo. 227 57
Kramer v. Mfg. Co., 120 Mo. App. 247 224
Kreis v. R. R., 131 Mo. 533 ..... 17, 19

L

Lack v. Brecht, 166 Mo. 242 557
Lacy v. Gilson, 36 Mo. 320 277
La Force v. Ins. Co., 43 Mo. App. 518 6
Lakeman v. Trust Co., 147 Mo. App. 58 351
Land Co. v. Rhodes, 54 Mo. App. 129 201
Landis v. Saxton, 105 Mo. 486 120
Langan v. R. R., 72 Mo. 392 227
Lanitz v. King, 93 Mo. 513 57
Latimer v. St. R. R., 126 Mo. App. 70 82
Laub v. R. R., 118 Mo. App. 488 628
Laudman v. Ingram, 49 Mo. 212 ..... 182, 183
Laun v. R. R., 216 Mo. 579 261
Lavin v. Grand Lodge, 112 Mo. App. 1 47
Lee v. Kaiser, 80 Mo. 431 483
Lee v. R. R., 195 Mo. 400 301
Liecken v. Ins. Co., 154 Mo. App. 440 429
Lien v. R. R., 79 Mo. App. 475 256
Life Assn., etc. v. Boogher, 3 Mo. App. 173 657
Lillies v. R. R., 64 Mo. 464 631

Digitized by Google

Lingenfelden v. Brewning Co., 103 Mo. 578..... 413
Link v. Hathway, 143 Mo. App. 509..... 255
Litten v. R. R., 111 Mo. App. 140..... 693
Loftus v. St. R. R., 220 Mo. 470..... 18
Lohse Door Co. v. Fuelle, 215 Mo. 421.....649, 657
Longan v. Weltmer, 180 Mo. 322..... 86
Loring v. R. R., 128 Mo. 359..... 551
Lowe v. Lowe Exrs., 163 Mo. App. 213..... 441

M

Machine Co. v. Tomlin, 161 S. W. 286..... 201
MacLeod v. Skiles, 81 Mo. 595..... 181
Markowitz v. R. R., 186 Mo. 359..... 263
Marshall Livery Co. v. McKelvey, 55 Mo. App. 240..... 172
Martin v. Jones, 155 Mo. App. 497..... 442
Marx & Hass, etc. Co. v. Watson, 168 Mo. 133..... 657
Mathews v. R. R., 142 Mo. 645..... 590
Mathews v. St. R. R., 156 Mo. App. 715..... 323
Maupin v. Miller, 164 Mo. App. 149..... 673
Meir v. Proctor & Gamble Co., 81 Mo. App. 410..... 396
Mellor v. R. R., 155 Mo. 455, 464..... 693
Meltz v. Rope Co., 174 Mo. App. 94..... 461
Merrill v. Trust Co., 46 Mo. App. 236.....397, 414
Miller v. Grand Lodge, 72 Mo. App. 499..... 46
Minea, his next friend, v. Cooperage Co., 175 Mo. App. 91..... 709
Mining Co. v. Casualty Co., 143 Mo. App. 555..... 139
Mining Co. v. Webster, 193 Mo. 351.....17, 18
Mirrieless v. R. R., 163 Mo. 492..... 380
Mitchell v. Sanford, 149 Mo. App. 72..... 471
Moeller v. St. R. R., 242 Mo. 721..... 552
Montgomery Co. v. Auchly, 92 Mo. 126..... 414
Moomaw v. Emerson, 80 Mo. App. 318..... 414
Moore v. Otis, 18 Mo. 118..... 483
Mootes v. Cope, 147 Mo. App. 76..... 416
Morgan v. Porter, 103 Mo. 135..... 56
Morrow v. R. R., 140 Mo. App. 200..... 418
Morton v. Heidorn, 135 Mo. 617..... 259
Mulroy v. Supreme Lodge, 28 Mo. App. 463.....46, 615
Murphy v. Carlin, 113 Mo. 112..... 381
Myler v. Hughes, 60 Mo. 105..... 392

Mc

McCandless v. Moore, 50 Mo. 511..... 277
McClure v. Ullman, 112 Mo. App. 697..... 713
McConnell v. Brayner, 63 Mo. 461..... 183
McCoy v. Green, 83 Mo. 626..... 201
McCreery v. R. R., 221 Mo. 289..... 263
McDearmott v. Sedgwick, 140 Mo. 172..... 704
McDermott v. R. R., 87 Mo. 285.....507, 715

Digitized by Google

McDonald v. Loewen, 145 Mo. App. 49..... 139
McDonald v. R. R., 165 Mo. App. 75..... 602
McFarland v. Assn., 124 Mo. 204..... 19
McFarland v. Heim, 127 Mo. 327..... 414
McGee v. R. R., 214 Mo. 530..... 553
McGrath v. Transit Co., 197 Mo. 97..... 263
McIntyre v. McIntyre, 80 Mo. 470..... 280
McLean v. Martin, 45 Mo. 393..... 270
McMahan v. Geiger, 73 Mo. 145..... 414
McMillan v. Parkell, 64 Mo. 286..... 341
McNance v. Cole, 134 Mo. App. 266..... 271
McNichols v. Nelson, 45 Mo. App. 446..... 396
McNulty v. R. R., 166 Mo. 439..... 553
McQuerry v. St. R. R., 117 Mo. App. 255.....600, 602
McVeigh's Estate, In re., 164 S. W. 673..... 385

N

Nash v. Kansas City, etc., Brick Co., 109 Mo. App. 600..... 694
Nedvidek v. Meyer, 46 Mo. 600..... 183
Nelson v. St. R. R., 113 Mo. App. 659..... 84
Nelson v. St. R. R., 158 S. W. 446..... 86
Nelson v. Troll, 173 Mo. App. 51..... 442
Newton v. R. R., 168 Mo. App. 199..... 279
Nicholas v. Kelly, 159 Mo. App. 20..... 363
Nicol & Co. v. Hyre & Co., 58 Mo. App. 134..... 19
Noe v. Kern, 93 Mo. 367..... 382
Nolan v. St. R. R., 250 Mo. 602..... 324
Norfleet v. Hutchins, 68 Mo. 597..... 392

O

O'Brien v. Transit Co., 185 Mo. 263..... 600
O'Kowd v. R. R., 166 Mo. App. 669..... 515
Ogan v. R. R., 142 Mo. App. 252..... 531
Oglebay v. Kansas City College of Dental Surgery, 71 Mo. App. 339..... 694
Oglesby v. R. R., 177 Mo. 272, 296..... 321
Osborn v. Emery, 51 Mo. App. 408..... 417
Osborn v. Schutt, 67 Mo. 712..... 101
Otrich v. R. R., 154 Mo. App. 420..... 676
Overton v. McCabe, 109 S. W. 861..... 204

P

Pan v. Braishear, 65 Mo. App. 24..... 637
Paper Co. v. Publishing Co., 156 Mo. App. 187..... 171
Patterson v. Ins. Co., 164 Mo. App. 157..... 414
Patterson v. Yancy, 97 Mo. App. 681..... 239
Patton v. Forgey, 171 Mo. App. 1..... 654
Perkins v. Baer, 95 Mo. App. 70..... 282

Digitized by Google

Perry v. Movis, 104 S. W. 571 204
Phillips v. Mfg. Co., 129 Mo. App. 396 473
Phillips v. R. R., 211 Mo. 419 715
Picot v. Ligniago, 22 Mo. 587 341
Plumbing Co. v. Brewing Co., 126 Mo. App. 268 694
Porter v. Woods, 138 Mo. 539 396
Powell v. Gott, 13 Mo. 458 194
Pullis v. Pullis, 157 Mo. 565 483
Price v. Mining Co., 83 Mo. App. 470 431
Probert v. Garth, 155 Mo. App. 390 298
Proctor v. R. R., 42 Mo. App. 124 243

R

Railroad v. Bank, 212 Mo. 505 471
R. R. v. Wise, 109 S. W. 112 204
Ramey v. Packing Co., 132 Mo. App. 327 238
Rashall v. R. R., 249 Mo. 516 202
Redmond v. R. R., 225 Mo. 721 190
Reed v. Bright, 232 Mo. 399 244
Reed v. Peck, 163 Mo. 333 694
Reigert v. Coal & Coke Co., 217 Mo. 142 416
Reporting Co. v. Grain Co., 135 Mo. App. 10 473
Reynolds v. R. R., 162 Mo. App. 618 606
Rhea v. R. R., 171 Mo. App. 160 671
Rice v. Morton, 19 Mo. 264 350
Richter v. R. R., 145 Mo. App. 1 426
Rigby v. Transit Co., 153 Mo. App. 130 ..... 18, 20
Rinehart v. Long, 95 Mo. 396 282
Robertson v. R. R., 152 Mo. 382 606
Robinson v. Campbell, 8 Mo. 364 277
Robinson v. Ins. Co., 168 Mo. App. 259 430
Rodan v. Transit Co., 207 Mo. 392 18
Rodgers v. Schiele, 148 Mo. App. 53 460
Ross v. R. R., 141 Mo. 390 244
Rude v. City of St. Louis, 93 Mo. 406 ..... 654, 655
Rundelmann v. Boiler Works Co., 178 Mo. App. 642 ..... 480, 492
Ryan v. Kansas City, 232 Mo. 471 551

S

Saller v. McMurray, 113 Mo. App. 253 465
Samstag v. Conley, 64 Mo. 476 201
Sanguinette v. R. R., 196 Mo. 489 261
Schaub v. R. R., 133 Mo. App. 444 427
Schaefer v. R. R., 128 Mo. 64 323
Schepers v. R. R., 126 Mo. 665 323
Scholl v. Grayson, 147 Mo. App. 664 539
Schopp v. City of St. Louis, 117 Mo. 131 655
Schumaker Estate v. Reel, 61 Mo. 592 382
Schwartz v. Dryden, 25 Mo. 572 270

Digitized by Google

Scriba v. Neely, 130 Mo. App. 258 415
Sedalia v. Montgomery, 227 Mo. 1 329
See v. Malonee, 107 Mo. App. 721 184
Shanly v. Laclede Gaslight Co., 63 Mo. App. 123 .....637, 638
Shannon v. Abell, 155 S. W. 62 465
Shannon v. Mastin, 134 Mo. App. 50 270
Shelby County v. Bragg, 135 Mo. 291 120
Sheridan v. Flemming, 93 Mo. 325 299
Shockley v. Fischer, 21 Mo. App. 551 376
Shohoney v. R. R., 231 Mo. 131 703
Short v. R. R., 150 Mo. 359 631
Shouse v. Nieswaanger, 18 Mo. App. 236 418
Sinnamon v. Moore, 161 Mo. App. 168 464
Slater v. Supreme Lodge, 76 Mo. App. 387 46
Smith v. Aultman, 120 Mo. App. 462 301
Smith v. Brinkley, 151 Mo. App. 494 402
Smith v. Fordyce, 190 Mo. 24 295
Smith v. Haley, 41 Mo. App. 611 557
Smith v. R. R., 150 Mo. App. 1 257
Snorgrass v. Thomas, 166 Mo. App. 1 381
Soap Works v. Sayers, 57 Mo. App. 310 380
Sonnenfeld v. Rosenthal, 247 Mo. 338 397
Spencer v. Transit Co., 111 Mo. App. 653 324
Stephen v. Ellis, 65 Mo. 456 270
Stephen v. Lumber Co., 110 Mo. App. 398 460
Stewart v. Supreme Council, 36 Mo. App. 319 615
Stix v. Indemnity Co., 175 Mo. App. 171 6
Stockman v. R. R., 15 Mo. App. 503 104
Stone v. Bennett, 8 Mo. 43 139
Storage Co. v. Glassner, 169 Mo. 48 391
Stotler v. R. R., 200 Mo. 107 618
Stout v. R. R., 172 Mo. App. 113 84
Strauk v. Chewing Gum Co., 134 Mo. App. 110 427
Strother v. Barrow, 246 Mo. 241 397
Sublette v. R. R., 96 Mo. App. 120 486
Sutton v. Dameron, 100 Mo. 141 119
Sutton v. R. R., 159 Mo. App. 685 197
Swinney v. Goutz, 83 Mo. App. 549 431
Swacher v. McLaughlin, 139 Mo. 333 588

STATE

State v. Arnold, 206 Mo. 597 221
State v. Light Co., 212 Mo. 101 293
State v. Murphy, 119 Mo. App. 270 91
State v. Pollard, 174 Mo. 616 347
State v. Stanley, 225 Mo. 525 191
State v. Wallace, 209 Mo. 358 191

Digitized by Google

STATE EX REL.

State ex rel. v. Bates, 235 Mo. 283 299
State ex rel. v. Bland, 144 Mo. 534 292
State ex rel. v. Bland, 189 Mo. 197 651
State ex rel. Ury v. Gans, 72 Mo. App. 638 .....587, 589
State ex rel. v. Gibson, 187 Mo. 536 238
State ex rel. v. Holtcamp, 245 Mo. 655 444
State ex rel. v. Mosmon, 112 Mo. App. 547 486
State ex rel. v. Riley, 219 Mo. 667 191
State ex rel. Infant v. St. R. R., 146 Mo. 155 293
State ex rel. v. Walbridge, 119 Mo. 394 444
State ex rel. v. Yates, 231 Mo. 276 121

T

Tait v. Locke, 130 Mo. App. 273 637
Tally v. Schlatitz, 180 Mo. 231 270
Tausig v. R. R., 166 Mo. 28, 33 174
Terpenning v. Nicholls, 140 Mo. App. 505 426
Tetwiler v. R. R., 242 Mo. 178 259
Thetford v. Ins. Co., 140 Mo. App. 254 399
Thiele v. R. R., 140 Mo. 319 417
Thompson Adm. v. Johnson, —— Mo. App. —— 442
Throckmorton v. Pence, 121 Mo. 50 270
Troll v. Protected Home Circle, 161 Mo. App. 719 619
Tucker v. Telephone Co., 132 Mo. App. 418 506
Turner v. Brown, 82 Mo. App. 30 277
Turner v. Northcut, 9 Mo. 244 483
Tyson v. Farm & C. Assn., 156 Mo. 588 590

V

Valles' Heirs v. Flemming Heirs, 29 Mo. 152 .....270, 274
Van Hoefen v. Taxi-Cab Co., 179 Mo. App. 591 630
Van Hoose v. Machinery Co., 169 Mo. App. 54 426
Van Riper v. Morton, 61 App. 440 376
Vermillion v. Parsons, 98 Mo. App. 72 19

W

Waggoner v. R. R., 152 Mo. App. 179 262
Wallack v. Transit Co., 123 Mo. App. 160 84
Warren v. Mfg. Co., 161 Mo. 112 416
Watcham v. Inside Inn Co., 159 Mo. App. 33 174
Water Works Co. v. City of Joplin, 177 Mo. 496 682
Waters v. Herboth, 178 Mo. 166 440
Waters Pierce Oil Co. v. Zinc Co., 98 Mo. App. 324 716
Watkins v. McDonald, 70 Mo. App. 357 589
Wear Bros. v. Schmelzer, 92 Mo. App. 314 414

Digitized by Google

Webb v. Hayden, 166 Mo. 46..... 381
Webb v. Ins. Co., 134 Mo. App. 576..... 429
Webb v. Strobach, 143 Mo. App. 459..... 329
Weigman v. R. R., 223 Mo. 721.....257, 261
Welch v. Mische, 154 Mo. App. 724..... 414
Wells v. Hobson, 91 Mo. App. 379..... 576
Wentzville Tob. Co. v. Walker, 123 Mo. 662..... 557
Whaley v. Whaley, 50 Mo. 582..... 442
Wheat v. St. Louis, 179 Mo. 581..... 551
Wheeler v. Bowles, 163 Mo. 398..... 86
Wheless v. Grocer Co., 140 Mo. App. 572..... 399
White v. Smith, 174 Mo. 206.....351, 391
Williams v. R. R., 153 Mo. 487..... 557
Williams v. Williams, 67 Mo. 662..... 414
Wilson & Son v. Russler & Knagi, 91 Mo. App. 275.....414, 418
Winscott v. R. R., 151 Mo. App. 381..... 227
Wishart v. Gerhart, 105 Mo. App. 112..... 186
Wojtylak v. Coal Co., 188 Mo. 260..... 223
Woodson v. St. R. R., 224 Mo. 685..... 551
Wright v. R. R., 118 Mo. App. 392..... 575

Y

Young v. R. R., 227 Mo. 307..... 362

Z

Zachra v. Mfg. Co., 159 Mo. App. 96..... 691
Zerr v. Klug, 121 Mo. App. 286..... 416
Zuppman v. Bauer, 17 Mo. App. 678..... 104

Digitized by Google

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1913.

(*Continued from Volume 178.*)

KATHERINE MITCHELL, Appellant, v. GERMAN COMMERCIAL ACCIDENT COMPANY, Respondent.

St. Louis Court of Appeals, December 2, 1913.

1. **ACCIDENT INSURANCE: Accidental Death While Passenger: Construction of Policy.** A policy insuring against loss of life from injuries caused exclusively by external, violent, and accidental means, received while riding as a passenger in a place regularly provided for the transportation of passengers within a surface or elevated railroad car, does not cover a death resulting from an attempt to board a moving street car.

2. **INSURANCE: Rules for Construing Policies.** Language employed in an insurance policy is to be construed so as to effectuate the insurance and not so as to defeat it, and where the language is doubtful in the least, it is to be strictly construed against insurer and in such a way as to protect the interests of insured, so that, where words are susceptible of the interpretation given them by insured to afford indemnity, they will be so construed, although insurer, in fact, intended otherwise; but this rule does not authorize the courts to distort certain and definite covenants, expressed in plain English, so as to make them include a risk which is clearly excluded by the insurance contract.

Digitized by Google

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

AFFIRMED.

Barclay, Fauntleroy, Cullen & Orthwein, Igoe & Carroll, and *Wm. R. Gilbert* for appellant.

The court erred in giving the peremptory instruction, because death from accident is covered by the policy. (a) The exemption from liability for injuries, not received on a common carrier, does not refer to the death provision, but is limited to the injuries mentioned. Chatterton v. Ins. Co., 68 N. J. L. 79. Where the company has by its policy distinguished between injuries and injuries, fatal or otherwise, injuries means only those not resulting in death. McGlinchey v. Fid. & Cas. Co., 80 Maine 251. (b) By the policy itself where it is intended to include injuries and death, the injuries are referred to, as fatal or otherwise, as witness the language where the exemption from liability while under the influence of liquor, violating the law, or suffering from vertigo or exposure. Where a policy is capable of two meanings that which is favorable to the insured will be adopted. Stix v. Travelers Ind. Co., 157 S. W. 870; Hoffmann v. Accident Ind. Co., 56 Mo. App. 301. (c) And if susceptible of the construction invoked by the assured, that construction will be enforced. La Force v. Ins. Co., 43 Mo. App. 518. (d) The contract will be construed to effectuate the indemnity. Roseberry v. Benev. Ass'n, 143 Mo. App. 552. (e) And this is true, although the insurer may have intended otherwise. Hoffmann v. Acc. Ind. Co., 56 Mo. App. 301; Hale v. Ins. Co., 46 Mo. App. 508; La Force v. Ins. Co., 43 Mo. App. 518. (f) The courts will not permit a company to ingeniously construct a policy to hold out hope in one part while defeating it in another. Fidelity and Casualty Co. v. Hart, 133 S. W. 996, 999.

Digitized by Google

Jones, Hocker, Hawes & Angert and *J. Lionberger Davis* for respondent.

(1) A case must be heard and determined in the appellate court upon the same theory upon which it was tried and determined below. Huss v. Bakery Co., 210 Mo. 44; Hume v. Hale, 146 Mo. App. 659; Manzke v. Goldenberg, 149 Mo. App. 12. (2) The contract of insurance clearly provides for limited accident insurance as indicated in the application and policy and not for ordinary life insurance.

NORTONI, J.—This is a suit on a policy of accident insurance. At the conclusion of the evidence the court gave judgment for defendant as a conclusion of law, and plaintiff prosecutes the appeal.

It appears that plaintiff is the widow of Charles C. Mitchell, the insured, and as such she is the beneficiary in the policy. Charles C. Mitchell, plaintiff's insured husband, came to his death from injuries received while attempting to board a moving street car in the city of St. Louis, but before he had entered the same. The suit is for $1000, the death benefit specified in the policy, provided death occur from accidental cause while the insured is riding as a passenger in a place regularly provided for the transportation of passengers within a car.

It is argued for plaintiff that the $1000 death benefit vouchsafed in the policy obtains in favor of plaintiff, if the death was caused from any external or violent injury occasioned through accident, and the question for consideration relates alone to an interpretation of the policy provision touching this subject-matter. So much of the policy as is relevant will be copied here. After preliminary recitals, the policy stipulates insurance as follows:

Digitized by Google

"A. In the sum of $1000 FOR LOSS OF LIFE, or Special features—

Loss of both entire eyes, meaning total, permanent and irrecoverable loss of the sight of both eyes $500

Loss of both entire hands, by actual and complete severance at or above the wrists..... $500

Loss of both entire feet, by actual and complete severance at or above the ankles $500

Loss of one entire hand and one entire foot, by actual and complete severance at or above the wrist and ankle $250

Loss of one entire hand, by actual and complete severance at or above the wrist $100

Loss of one entire foot, by actual and complete severance at or above the ankle $100

Loss of one entire eye, meaning total, permanent and irrecoverable loss of the sight of one eye $50

"Provided such injuries are effected exclusively by external, violent and accidental means, which independently of all other causes, immediately, continuously and wholly disable the insured, or be the sole cause of the death, or dismemberment, or loss of sight of the insured, within thirty days from the date of the event causing such injury, and said injuries to the insured shall occur while riding as a passenger in a place regularly provided for the transportation of passengers, within a surface or elevated railroad car, steamboat or other public conveyance provided by a common carrier for passenger service only, including a passenger elevator, and in consequence of a collision or other accident causing actual and material damage to the conveyance in which the insured is so riding."

By way of condensation, we may eliminate, for the moment, the several specifications for loss of eyes, hands, feet, etc., and consider that alone which per-

Digitized by Google

tains to the loss of life, for such is the case in judgment. In such circumstances the policy provides insurance, "A. in the sum of $1000 for loss of life . . . provided such injuries are effected exclusively by external, violent and accidental means which shall independently of all other causes . . . be the sole cause of the death . . . within thirty days from the date of the event causing such injury; and said injuries to the insured shall occur while riding as a passenger in place regularly provided for the transportation of passengers within a surface or elevated railroad car, steamboat or other public conveyance provided by a common carrier for passenger service only, including a passenger elevator, and in consequence of a collision or other accident causing actual and material damage to the conveyance in which the insured is so riding." It is conceded here that there was no collision or other accident causing actual and material damage to the street car plaintiff's husband sought to board, and it is conceded, too, that he had not attained a place within the car, for he met his death on the street in an attempt to take passage on the conveyance. The language of the policy is entirely clear to the effect that insurance in the sum of $1000 for accidental death is vouchsafed only in those cases where the injuries received which result in death occur while riding as a passenger in a place regularly provided for the transportation of passengers by a common carrier, etc. The proviso of the policy above copied goes to the effect, not only that the injuries from which the death results shall be effected exclusively by external, violent and accidental means, but, through the conjunction "and," stipulates that it is provided, as a condition of the insurance as well, that the injuries to the insured shall occur while riding as a passenger, etc. This is entirely clear.

There can be no doubt of the rule of construction which obtains, to the effect that language employed in

Digitized by Google

insurance policies is to be construed so as to effectuate the insurance and not for the purpose of defeating it, for it is said the insurance vouchsafed is the very object and purpose of the contract. It is true, too, that if the language employed in the policy is in the least doubtful it is to be more strictly construed against the company who selects and incorporates it into the policy, and in such a way as to protect the interests of the insured who has paid a consideration for the indemnity. [See Stix v. Travelers' Indemnity, etc. Co., 175 Mo. App. 171, 157 S. W. 870, 872.] Therefore, as another court has expressed it, if the words employed in the policy are susceptible of the interpretation given them by the insured to afford indemnity, they will be so construed although the insurer in fact intended otherwise. [See La Force v. Williams City Ins. Co., 43 Mo. App. 518, 530.]

Under this rule of construction, it is urged the policy should be interpreted here as one providing indemnity against every death resulting from external injuries received through an accidental cause, for it is said that a subsequent provision of the policy implies as much in discriminating between injuries, "fatal or otherwise," and therefore suggests the thought that the injuries contemplated in the portion of the policy above copied, which are covered only when riding within the passenger car, are those other than from which death ensues. Among the conditions printed on the policy, it is stipulated that "this insurance does not cover . . . injuries fatal or otherwise resulting from vertigo or from exposure to unnecessary danger . . . or while racing, etc." Because this exemption from liability for loss on account of such injuries, fatal or otherwise, provided in terms in this condition of the policy does not include as well an express exemption from liability for death from accident when not riding as a passenger within the car, it is urged the prior provisions of the policy should be con-

Digitized by Google

strued as limiting the insurance on the condition of being a passenger within the car to those injuries only from which death does not ensue. But we are unable to discern anything in this portion of the policy which should be regarded as enlarging the covenant of indemnity in the provisions above set forth. It is obvious this condition of the policy provides an exemption in certain cases which might be otherwise included as within the covenant of insurance, but it is equally obvious that the covenant of insurance whereby $1000 is stipulated in event of death does not include a death from accident, except it occur while the insured is a passenger. Though it be that the language of insurance contracts is to be construed most favorably to the insured and against the insurer with a view to effectuating the insurance and that all doubtful language is to be resolved in favor of the insured, the courts are not authorized to seize upon certain and definite covenants, expressed in plain English, with violent hands and distort them so as to include a risk clearly excluded by the insurance contract.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

STATE OF MISSOURI, Respondent, v. LANDON POWELL, Appellant.

St. Louis Court of Appeals, December 2, 1913.

1. **CRIMES AND PUNISHMENTS: Appellate Practice: Duty of Court to Examine Record.** On appeal from a judgment of conviction in a criminal prosecution, it is the duty of the court, under Sec. 5312, R. S. 1909, to examine the record for error, notwithstanding appellant fails to file a brief.

2. **LARCENY: Indictments and Informations: Sufficiency of Information.** An information charging defendant with petit larceny *held* sufficient.

3. ———: **Sufficiency of Evidence.** Evidence in a prosecution for petit larceny *held* sufficient to sustain a conviction.

Digitized by Google

Appeal from St. Louis Court of Criminal Correction.—*Hon. Calvin N. Miller,* Judge.

AFFIRMED.

NORTONI, J.—Defendant appeals from a judgment of conviction on a charge of petit larceny. Though the record proper and bill of exceptions are before us, it appears neither party has filed a brief in the case. However, it is our duty under the statute to examine the record for error and this we have done.

The information is in the usual form and sufficient in all its parts. By it the prosecuting attorney, under his oath of office, charged defendant with having stolen, taken and carried away certain dishes and edibles of the value of six dollars, the property of Fred Harvey, a corporation.

There is an abundance of evidence in the record tending to prove the charge as laid. It appears that Fred Harvey, a corporation, the owner of the edibles and dishes, which it is alleged defendant stole and carried away, owns and operates the dining service on the St. Louis & San Francisco Railroad. In connection with this business, Fred Harvey, the corporation, operates certain dining cars thereon. An inspector in the employ of Fred Harvey boarded one of its incoming dining cars at Tower Grove station in the city of St. Louis and discovered defendant in possession of the stolen edibles and dishes, which it appears he packed away in his grip and was about to remove from the car. Upon being confronted by the inspector with the charge of theft concerning these articles, it is said defendant substantially admitted it. According to the evidence, defendant said, "You have gotten me. I am damnably guilty." The court found defendant guilty of the charge laid—that is, petit larceny—and assessed as his punishment confinement in the workhouse for a term of three months, on which finding

Digitized by Google

and assessment of punishment it appears a judgment of conviction was duly entered. The evidence is ample to support the conviction and no error of law appears in the record.

The judgment should, therefore, be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

JAMES L. CLARKSON, Appellant, v. PATRICK F. GARVEY et al., Respondents.

St. Louis Court of Appeals, December 2, 1913.

1. **NEW TRIAL: Grounds for Granting: Opinion of Trial Judge: Appellate Practice.** A written opinion, prepared by the trial judge on sustaining a motion for a new trial, to be available as disclosing the grounds upon which a new trial was granted, must be spread of record in the case.

2. **———: No Ground Assigned: Appellate Practice: Review.** Where the record does not disclose the ground upon which the trial court sustained a motion for a new trial, its action will be reviewed, on appeal, with reference to the several grounds set out in the motion, and such action will be upheld if it was a proper exercise of the court's discretion on any of such grounds, as that the verdict was against the weight of the evidence.

3. **———: Verdict Against Weight of Evidence.** It is proper to grant a new trial on the ground that the verdict is against the weight of the evidence, and an award of a new trial on that ground should be sustained, unless an abuse of judicial discretion appears.

4. **———: Discretionary Grounds.** The award of one new trial will not be disturbed, on appeal, as for an abuse of discretion, if there is substantial evidence in the record in favor of, or such as will sustain, a verdict for the party to whom the new trial is granted.

5. **———: ———: Verdict Against Weight of Evidence.** In an action against the business agent and other officers of a labor union for conspiracy, by threatening plaintiff's employer with a strike unless he discharged plaintiff, as a result of which plaintiff lost his job, where the court granted defendants a new

Digitized by Google

trial, without assigning any ground therefor, *held* that the evidence was sufficient to have sustained a verdict for such other officers, if a verdict had been returned in their favor, and hence the action of the trial court will be upheld on the theory that it awarded the new trial because the verdict was against the weight of the evidence—that being one of the grounds stated in the motion.

6. **CONSPIRACY: Action Against Officers of Labor Union: Burden of Proof.** In an action against the business agent and other officers of a labor union for conspiracy, by threatening plaintiff's employer with a strike, unless he discharged plaintiff, as a result of which plaintiff lost his job, plaintiff had the burden of proof throughout to show that the other defendants conspired with, or were responsible for, or ratified, the business agent's acts.

7. **NEW TRIAL: Insufficiency of Evidence: Excessive Damages: Number of New Trials.** Under Sec. 2023, R. S. 1909, if one verdict has been set aside on the ground of insufficiency of the evidence, a second verdict cannot be set aside for the same cause; but one new trial may be granted to either party on that ground, or on the ground that the verdict is against the weight of the evidence, regardless of the number of new trials that may have been theretofore granted to the same party on other grounds, and hence where a new trial was granted to a defendant on the ground that punitive damages awarded against him were excessive, a new trial could be awarded him, at a subsequent trial, on the ground that the verdict was against the weight of the evidence.

8. **———: Verdict Against Weight of Evidence.** Where the plaintiff has the burden of proof and the defendant does not make any admission that would authorize a verdict against him, a verdict in his favor would be justifiable under the evidence, since the jury could reject plaintiff's evidence as being insufficient; and hence the granting of a new trial to the defendant would be upheld, on appeal, under the rule that such action will not be disturbed if the evidence will sustain a verdict for the party to whom the new trial was granted.

9. **———: ———.** In an action against the business agent of a local union for conspiracy, by threatening plaintiff's employer with a strike unless he discharged plaintiff, as a result of which plaintiff lost his job, evidence *held* sufficient to have sustained a verdict for defendant, if a verdict had been returned in his favor, and hence the action of the trial court in granting him a new trial, without assigning any ground therefor, will be upheld on the theory that it was granted because the verdict was against the weight of the evidence—that being one of the grounds stated in the motion.

Digitized by Google

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

AFFIRMED AND REMANDED (*with directions*).

Albert E. Hausman for appellant.

(1) Every member of Local Union No. 1 is liable in damages to any person who suffers loss through the enforcement of its written or unwritten rules, which provide that no man can work as a roofer in any union shop in St. Louis, unless he is a member of their union or unless he is otherwise satisfactory to it. Purington v. Hinchcliffe, 219 Ill. 159; Doremus v. Hennessy, 176 Ill. 508; Eddy on Combinations, par. 368, 376, 380; Giblan v. National Amalgamated Laborers Union, 2 K. B. 600; Taff Vale Railway v. Amalgamated Society, 1901 Appeal Cases, 426; Walsh v. Master Plumbers, 97 Mo. App. 292; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421. (2) To procure the discharge of an employee by threats of a strike against his employer is an actionable wrong. Likewise to cause the breach of a contract by threats of a strike against one of the contracting parties is an actionable wrong. Berry v. Donovan, 5 L. R. A. (N. S.) 899; Quinn v. Leathem, 1901 Appeal Cases, 495; Curry v. Galen, 152 N. Y. 33; Brennan v. United Hatters, 9 L. R. A. (N. S.) 254; Luecke v. Clothing Cutters, 19 L. R. A. 408; Giblan v. Amalgamated Union, 2 K. B. 600; Thomas v. Railroad, 62 Federal Rep. 803; Moore v. Bricklayers Union, 23 Weekly Cincinnati Law Bulletin, 48; London Guaranty Co. v. Horn, 101 Ill. App. 335, and 176 Ill. 608; Wilner v. Silverman, 109 Md. 341; Illinois Steel Co. v. Brenshall, 141 Ill. App. 36; Gibson v. Fidelity Company, 232 Ill. Sup. 49; Huskie v. Griffin, 75 N. H. 345; Hey v. Wilson, 232 Ill. 389; Reed v. Friendly Society of Stone Masons, 2 K. B. p. 88; Booth v. Burgess, 65 Atl. 226; Lohse Patent Door Co. v. Fuelle, 215 Mo.

Digitized by Google

421; Carter v. Oster, 134 Mo. App. 146; Swaine v. Blackmore, 75 Mo. App. 74; Lally v. Cantwell, 30 Mo. App. 524, and 40 Mo. App. 44; Beekman v. Marstens, 195 Mass. 205. (3) Combinations between officers and members of a labor union having for their direct object the immediate effect to injure and damage the business of persons at whom they are directed and thereby compel them to discharge their nonunion employees and replace them with members of the union, and thereby incidentally and indirectly to benefit the parties to the combination, are unlawful. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421. (4) And in an action for such a tort damages for loss already accrued and to accrue may be recovered. Walker v. Cronin, 107 Mass. 555; Barry v. Donovan, supra; London Guaranty Co. v. Horn, supra. (5) This cause has been twice tried and a verdict rendered for plaintiff at each trial. The first verdict was set aside and new trial granted because the verdict was excessive. Therefore, the only question which can be now considered is, Did the triers of the fact err in a matter of law; or were they guilty of misbehavior. Sec. 2033, R. S. 1909.

T. J. Rowe, Thos. J. Rowe, Jr., and *Henry Rowe* for respondents.

(1) Defendants' demurrer to the petition should have been sustained. (2) Only one new trial was granted all the defendants except Patrick Garvey. R. S. 1909, Secs. 2022, 2023. (3) There was no evidence to support the verdict against any of the defendants, and the court did right in sustaining their motion for a new trial. (4) The granting of a new trial rests in the sound discretion of the trial court, and its action in that behalf will not be disturbed on appeal unless it appears that its discretionary power is abused. Roden v. St. Louis Transit Co., 207 Mo. 392; Gould v. St. John, 207 Mo. 619; Morell v. Lawrence, 203 Mo.

Digitized by Google

381. (5) The trial court committed no error in sustaining defendants' motions for a new trial for the following reasons: Firstly, the verdict of the jury was against the overwhelming weight of the evidence and the result of bias, prejudice and passion. Secondly, the court erred in giving Instructions 1, 2 and 3 offered by plaintiff, and in refusing Instruction B offered by defendants. (6) The members of a voluntary association are not liable for the wrongful acts of the agents of such association unless they directed, participated in or approved of such wrongful acts. Mere membership in a voluntary association is not sufficient to make a member liable for the wrongful acts of the agent of the association. (7) Patrick Garvey, either as an individual or as the business agent of Local Union No. 1, was not guilty of any wrongful or illegal act as against the plaintiff and the evidence in the case fails to make a prima-facie case as against him.

NORTONI, J.—This is a suit for both actual and punitive damages said to have accrued to plaintiff through the wrongful conduct of defendants in coercing his discharge from service and causing the breach of certain contracts by another, to his detriment. Plaintiff recovered at the trial, but the court sustained defendants' motions for a new trial and set the verdict aside. The appeal is prosecuted by plaintiff from the order of the court setting aside the verdict and granting defendants a new trial.

Plaintiff is a journeyman composition roofer by occupation and defendants are all members and officers of Local Union No. 1, International Brotherhood of Composition Roofers, Damp and Waterproof Workers, of St. Louis, Missouri. This organization is a voluntary one and unincorporated. It seems to be a branch, and is affiliated with the Building Trades Council of the city of St. Louis, in which organization all of the building trades of the city, save the bricklayers,

Digitized by Google

are affiliated. The several defendants are the officers of Local Union No. 1 and defendant Patrick G. Garvey is the business agent of the union. Frederick Laibly was president of Local Union No. 1 at the time complained of, while Eugene Moriarity was vice-president thereof, Michael McCarthy was recording secretary, and Michael Shannon the financial secretary of the union. Edward J. McCarthy was its treasurer, William Holstein its doorkeeper, and, as before said, Patrick F. Garvey was its business agent. All of the men so named are defendants here, and the suit proceeds against them jointly, for both actual and punitive damages.

It appears plaintiff was formerly a member of this union from 1903 to 1906, when he established a small roofing business for himself, and his membership in the union ceased because of that fact—that is, because he became an employer and was no longer a journeyman. About January or February, 1909, plaintiff sold his business and tools to the St. Louis Roofing Company and entered into an arrangement with that concern whereby he was to enter its employ. Plaintiff worked for that company one day and was laid off. Thereupon, Mr. Holland, the manager of the St. Louis Roofing Company, directed its shop foreman to place plaintiff in charge of a gang of men as a foreman or gaffer. Plaintiff reported for work at the shop of the St. Louis Roofing Company, and the foreman, Haley, in obedience to the order of the manager of the company, gave him a yellow slip, which signified his assignment to duty as the foreman of a gang. Thereupon defendant Patrick F. Garvey, business agent for Local Union No. 1, inquired of Haley, who was then present, whether or not all of the other men there waiting were to be given work that morning, and Haley replied in the negative. Garvey then said to Haley, "This man (meaning plaintiff) don't go to work either then," and Haley took from plaintiff his yellow slip and dis-

Digitized by Google

pensed with his services as foreman. Plaintiff then made application to become a member of the union, and Garvey and all of the defendants considered it that night, but deferred action thereon. Finally plaintiff's application for membership in the union was rejected, because, as he was told by Garvey, he had applied for work from the St. Louis Roofing Company through the office, and not at the shop where Garvey was stationed as the representative of the union.

Thereafter, on March 16, 1909, plaintiff entered into a contract with the St. Louis Roofing Company to roof a building to be occupied by the Rohan Boiler Works, and fourteen houses in Parkview. He entered upon this work as subcontractor, and on March 20, as he was completing the task of roofing the building to be occupied by the boiler works, defendant Garvey called upon him there and inquired what he was doing. Plaintiff informed Garvey he was roofing the building as subcontractor for the St. Louis Roofing Company, whereupon Garvey said to plaintiff, substantially, that he would not be permitted to continue working for that company. Garvey then said, "If the St. Louis Roofing Company gives you any more work, I will pull off every man they have on Monday morning"—that is, he would call a strike of the union men in the employ of the roofing company. The evidence tends to show there were seventy-five or one hundred union men, members of Local Union No. 1, of which defendants are officers and Garvey was business agent, then in the employ of the St. Louis Roofing Company. During the same afternoon, defendant Garvey called up Mr. Holland, manager of the St. Louis Roofing Company, over the telephone and told him he wanted to see him about Clarkson (plaintiff) working for the company. Holland replied he would have to hurry if he wanted to see him at the office. Garvey then said to Holland, "You had better wait or you will have one hundred men walk out on you Monday morning." Holland

Digitized by Google

waited, and Garvey came to his office and told him that unless he quit contracting with Clarkson (plaintiff) or giving him work, he would call all the roofers away from the St. Louis Roofing Company on a strike. It appears the St. Louis Roofing Company was pressed with business at the time and could not afford to have its affairs interrupted as threatened. Moreover, it is in evidence, too, that if such threat were carried out, it would entail a considerable loss upon the St. Louis Roofing Company, and, therefore, Mr. Holland notified plaintiff that that company would have to take the contracts out of his hands. Because of this, plaintiff lost his contracts with that company and remained unemployed for a considerable time.

The suit proceeds at law for both actual and punitive damages against all of the defendants, and the jury awarded plaintiff a recovery of $1200 actual damages and $2500 punitive damages. It appears the case was tried once before and the court nonsuited the plaintiff on his cause of action asserted against all of the defendants, save defendant Patrick F. Garvey, the business agent, against whom a recovery was had. Thereafter, the court sustained plaintiff's motion for a new trial and reinstated the case on the docket for further proceedings against Garvey's codefendants. At the same time, the court sustained defendant Patrick F. Garvey's motion for a new trial on the ground that the award of punitive damages by the jury in their verdict was excessive, and, therefore, the case was set down for trial again against all of the defendants.

At the second trial, a verdict was given for plaintiff against all of the defendants, and two motions for a new trial were duly filed. One of these motions was filed by defendant Patrick F. Garvey, alone, while the other was filed by all of the defendants, save Garvey, jointly. The court sustained both motions, set the verdict aside and granted a new trial to all of the defendants, but omitted to enter of record the ground

Digitized by Google

or grounds upon which the new trials were ordered, as the statute requires.

It is true a written opinion, said to have been prepared by the trial judge, indicating his views of the case, and delivered on sustaining the motions for a new trial, appears in the brief of defendants here. But be this as it may, such opinion is no part of the record and, therefore, it may not be utilized as disclosing the grounds, under the statute, for which the new trial is granted. To render such opinion available for that purpose, it should have been spread of record in the case, and it was not. Such has been expressly decided. [See Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440; Kreis v. Mo. Pac. R. Co., 131 Mo. 533, 33 S. W. 64, 1150.]

The record before us reveals no more than that the motions for a new trial were sustained on the part of all of the defendants, and a new trial ordered. With the case in this posture, the matter is to be reviewed with reference to the several grounds for a new trial set forth in the motion therefor, and the action of the court in sustaining the motion and awarding the new trial must be sustained, if it was a proper exercise of the discretion of the court to grant a new trial on any one of the grounds therefor set forth in the motion. [Met. etc. Mining Co. v. Webster, 193 Mo. 351, 92 S. W. 79; Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440; Kreis v. Mo. Pac. R. Co., 131 Mo. 533, 33 S. W. 1150.]

As before said, this is the first new trial granted to all of the defendants, save Patrick F. Garvey. In so far as the defendants, other than Garvey, are concerned, the question is not embarrassed by the new trial formerly granted in the case, for that was granted to plaintiff and not to them. This being true, it appears all of the defendants, save Garvey, stand in the position of having had awarded to them a new trial for the first time. Their motion for a new trial sets forth several grounds therefor and among such

Digitized by Google

grounds is that the verdict is against the weight of the evidence. It is proper for the court to grant a new trial because it regards the verdict as against the weight of the evidence, and as to this a broad judicial discretion is to be induged in favor of the trial judge. Indeed, when the new trial is granted on this ground, the ruling of the trial court with respect to that matter should be sustained unless there appears an abuse of judicial discretion—that is, that the court exercised its power in an arbitrary or improvident manner. [See Gould v. St. John, 207 Mo. 619, 106 S. W. 23; Rodan v. St. Louis Transit Co., 207 Mo. 392, 105 S. W. 1061; Rigby v. St. Louis Transit Co., 153 Mo. App. 330, 133 S. W. 110.] As a corollary to the rule of decision last cited, it is declared that the action of the trial court in granting but one new trial to the parties will not be disturbed on appeal in any case, as for an abuse of discretion in thus exercising its office of supervisor on the facts of the case, if there is in the record substantial evidence in favor of, or such as will sustain, a verdict for the party to whom the new trial is granted. [See Rigby v. St. Louis Transit Co., 153 Mo. App. 330, 133 S. W. 110; Loftus v. Met. St. R. Co., 220 Mo. 470, 481, 119 S. W. 942; Met. etc. Mining Co. v. Webster, 193 Mo. 351, 92 S. W. 79.] It is certain that we cannot say the trial court abused its discretion in granting a new trial to all of the defendants save Garvey, for, in any view of the case, a verdict in their favor would have been amply sustained on the evidence. Of course, the burden of proof was on plaintiff throughout the case, and it devolved upon him to show that these defendants conspired with Garvey or were responsible for or ratified his acts. It is true the record seems to be replete with evidence tending to prove that Garvey was the business agent for the unincorporated, voluntary association, of which his codefendants are officers. But be this as it may, there is evidence, too, tending to prove that these defendants did not conspire or co-

Digitized by Google

operate with him and that he was not authorized by them to perpetrate the particular wrong complained of, and that they did not ratify his acts. It is entirely clear that the evidence would support a verdict for these defendants if one should be awarded by the jury in their favor. The order granting a new trial to these defendants must, therefore, of course, be affirmed.

But the question recurs as to the new trial granted defendant Garvey on his motion therefor. In so far as defendant Garvey is concerned, this is the second new trial granted to him in this case. The first one was awarded because, in the opinion of the trial court, the award of punitive damages against him was excessive. The statute (Sec. 2023, R. S. 1909) provides only one new trial shall be allowed to either party, except: first, where the triers of the fact shall have erred in a matter of law; or, second, when the jury shall be guilty of misbehavior. Under this statute, a rule of decision is established to the effect that if the court has set aside one verdict on the ground of the insufficiency of the evidence, a second verdict cannot be set aside for the same cause. [See Vermillion v. Parsons, 98 Mo. App. 72, 71 S. W. 1092; McFarland v. United States, etc. Assn., 124 Mo. 204, 27 S. W. 436; Nicol & Co. v. Hyre & Co., 58 Mo. App. 134.] But the prior verdict against Garvey was not set aside on the ground that it was against the weight of the evidence or for its insufficiency, but because the award of punitive damages was excessive. Under the statute above cited, it is well settled by a judgment of our Supreme Court *en banc* that the trial court possesses power to grant one new trial to either party upon the grounds of the insufficiency of the evidence or that the verdict is against the weight of the evidence, regardless of the number of new trials that may have been theretofore granted to the same party upon other grounds. [See Kreis v. Mo. Pac. R. Co., 131 Mo. 533, 33 S. W. 64, 1150.] This being true, it would seem that the inhibi-

Digitized by Google

tion of the statute does not obtain even against the new trial granted to Garvey, on the ground that the verdict is against the weight of the evidence. His motion for a new trial, like that of his codefendants, above discussed, sets forth as one of the grounds for a new trial that the verdict was against the weight of the evidence. In sustaining the motion without specifying of record other grounds under the statute, the court affirmed this, among the others set forth in the motion, as the reason for which the new trial was granted. Therefore, the order granting a new trial to Garvey must be sustained, unless it appears the court abused its discretion in granting it. Such discretion, it is said, may not be regarded as abused when there is substantial evidence in the record tending to support a verdict in favor of the party to whom the new trial is awarded. [Rigby v. St. Louis Transit Co., 153 Mo. App. 330, 133 S. W. 110; Canterbury v. Kansas City, 130 Mo. App. 1, 108 S. W. 574; Karnes v. Winn, 126 Mo. App. 712, 105 S. W. 1098.] Of course, plaintiff bore the burden of proof throughout the case, and as defendant Garvey did not make such admissions, either in the pleadings or at the trial, as would authorize a verdict against him on that score alone, it would seem that a verdict in his favor would be supported by substantial evidence, for, after all, if the jury were to reject the evidence of plaintiff and his witnesses *in toto* as insufficient, it would suffice to support a verdict for Garvey. But beyond this, there is an award of punitive damages to the amount of $2500 in the verdict, and there is much evidence for Garvey that, though he perpetrated a wrong on plaintiff's rights, he acted in good faith and without malice and offered him employment elsewhere. This being true, it is clear there is substantial evidence in the record sufficient to support a verdict for Garvey, if the jury should award one in his favor, and, because of this fact, it cannot be said the court abused its discretion in granting him a new trial

Digitized by Google

for the reason the verdict was against the weight of the evidence.

The judgment should, therefore, be affirmed, and the cause remanded with directions to the trial court to proceed with the new trial. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

MINNIE E. BANGE, Appellant, v. SUPREME COUNCIL LEGION OF HONOR OF MISSOURI, Respondent.

St. Louis Court of Appeals, December 2, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Action for Death Benefit: Prima-Facie Case.** In an action on a death benefit certificate issued by a fraternal beneficiary association, the certificate, coupled with proof of death of insured, make out a prima-facie case, casting on defendant the burden of establishing its defense.

2. **———: Nonpayment of Assessment: Notice.** Where a by-law of a fraternal beneficiary association required notice of assessments levied to be mailed to the members at their regular addresses, the mailing of such notice was a condition precedent to the right of the association to declare a forfeiture of a benefit certificate because of nonpayment of an assessment.

3. **———: ———: By-Laws Construed.** The by-laws of a fraternal beneficiary association required members to pay assessments within thirty days after notice thereof was mailed to their regular addresses, and provided that a failure to do so before the first meeting of the local lodge after the expiration of the thirty days operated to suspend the member, but that the local lodge, by a majority vote, might make the payment for the delinquent. The local lodge had established the custom of deferring action on the question as to whether it would pay a delinquent's assessment until the next meeting after the assessment was levied. *Held*, that the by-laws were not self-executing, and that a member would not be suspended for nonpayment of an assessment, even though notice thereof was duly mailed to his regular address, until the local lodge had refused to pay the assessment and had declared him suspended.

Digitized by Google

4. ———: **Notice of Assessments.** The parties to an insurance contract may agree that the mailing of a notice to the regular address of the insured constitutes notice to him; and hence where a fraternal beneficiary association and a member made such an agreement, a notice of an assessment levied, mailed to the member's regular address, was notice to him, whether he received it or not.

5. ———: **Nonpayment of Assessment: Sufficiency of Notice.** In an action on a death benefit certificate issued by a fraternal beneficiary association, defended on the theory that insured had forfeited his certificate by reason of his failure to pay an assessment, *held* that whether notice of the assessment was mailed to insured's regular address, as required by the certificate and by-laws, was a question for the jury, under the evidence.

6. ———: ———: ———. Where the by-laws of a fraternal beneficiary association required notice of an assessment and of a suspension for nonpayment thereof to be mailed to the regular address of the member affected, and provided that a member who was suspended for nonpayment of an assessment could get reinstated by payment of the assessment within thirty days, proof of the member's actual receipt of the notice, in time for him to have exercised his right toward securing reinstatement within the thirty day period, is necessary to sustain his suspension, if the notices were not mailed to his regular address.

7. ———: ———: ———. Under a by-law of a fraternal beneficiary association, requiring notice to be given a member of his suspension for nonpayment of an assessment, it is necessary to sustain the suspension that he be given notice thereof by the association, and the fact that he obtained knowledge thereof in some other way will not suffice.

8. ———: ———: ———: **"Regular Address."** In an action on a death benefit certificate issued by a fraternal beneficiary association, where the question as to whether notice of an assessment had been sent to the "regular address" of insured, as required by the by-laws of the association, was in issue, an instruction which made the regular address of insured depend upon his intention of making that place his place of residence was erroneous, since the expression "regular address" merely referred to the place where insured would be most likely to get his mail.

9. ———: ———: **Acquiescence in Illegal Suspension.** Even though the suspension of a member of a fraternal beneficiary association is void, he is nevertheless under a duty to his

Digitized by Google

fellow-members to affirm or disaffirm the suspension in a distinct manner and within a reasonable time; and hence where a member, who is illegally suspended, although having knowledge of the suspension, takes no step to secure his reinstatement, allows assessments, which had accrued and were payable prior to his suspension, to remain unpaid, and does not tender such assessments to the association, nor any subsequently accruing, he will be treated as having acquiesced in his illegal suspension and having abandoned his insurance.

10. ———: ———: ———: Notice. In order that the acquiescence of a member of a fraternal beneficiary association in his illegal suspension from membership be binding, it is not necessary that he be given notice of the suspension by the association, as required by its by-laws, but it is sufficient if he acquires knowledge of the suspension in some other way.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin,* Judge.

REVERSED AND REMANDED.

James J. O'Donohoe for appellant.

(1) It is well settled that proof of the issuance of the beneficiary certificate and death of the member establish a prima-facie case. Winn v. Modern Woodmen, 157 Mo. App. 1; Bacon, Ben. Societies and Life Ins. (3 Ed.) sec. 414; Mulroy v. Knights, 28 Mo. App. 463; Stewart v. Legion of Honor, 36 Mo. App. 319; Force v. Knights of Honor, 41 Mo. App. 106; Chadwick v. Triple Alliance, 56 Mo. App. 478; Gruwell v. Knights and Ladies of Security, 126 Mo. App. 496; McReynolds v. Railroad, 115 Mo. App. 680; O'Malley v. Railroad, 113 Mo. 319; Boon v. Railroad, 20 Mo. App. 235; Gibson v. Zimmermann, 27 Mo. App. 90. The defendant's amended answer did not state facts sufficient to constitute any defense, and hence the plaintiff's objections to the introduction of any evidence on the part of the defendant should have been sustained. The court erred in refusing plaintiff's peremptory instruction at the close of the case. Bur-

Digitized by Google

chard v. Western Commercial Travelers Assn., 139 Mo. App. 606; Gruwell v. Knights and Ladies of Security, 126 Mo. App. 496; Chadwick v. Order of Triple Alliance, 56 Mo. App. 474; Force v. Knights of Honor, 41 Mo. App. 117; Mulroy v. Knights of Honor, 28 Mo. App. 467; Siebert v. Order of Chosen Friends, 23 Mo. App. 268; Dazell v. Ins. Co., 176 Mo. 253; May v. Crawford, 150 Mo. 504. (2) The defendant's law in reference to suspension for nonpayment of contributions is not self-executing. Bange v. Legion of Honor, 153 Mo. App. 154; Bange v. Legion of Honor, 128 Mo. App. 461; Mulroy v. Knights of Honor, 28 Mo. App. 468. The recorder of the local council had power to and did waive the prompt payment of contributions. Jones v. Ins. Co., 155 S. W. 1106; Modern Woodmen v. Angel, 127 Mo. App. 94; Andre v. Modern Woodmen, 102 Mo. App. 377; Cauveren v. Ancient Order of Pyramids, 98 Mo. App. 433; Courtney v. Relief Assn., 101 Mo. App. 261; Frame v. Woodmen of the World, 67 Mo. App. 127; Puhr v. Grand Lodge, 77 Mo. App. 47; Lewis v. Benefit Assn., 77 Mo. App. 586; McMahon v. Maccabees, 151 Mo. 522; Cline v. W. O. W., 111 Mo. App. 601; Walton v. Fraternal Aid Association, 149 Mo. App. 493. Defendant could not declare a forfeiture on account of the nonpayment of the contribution for the month of October, 1904, until it had notified Bange "of its decision to carry him no longer and had given him a reasonable opportunity to pay his arrearages." Britt v. Woodmen of the World, 153 Mo. App. 710; Seehorn v. Catholic K. of A., 95 Mo. App. 233. (3) 2094 Wilcox avenue, Chicago, Illinois, was Bange's regular address. Bange v. Legion of Honor, 128 Mo. App. 461; Bange v. Legion of Honor, 153 Mo. App. 154. The question as to what was Bange's regular address was a question of law for the court, and it was error for the court to give instructions to the jury that referred to their determination this question of law. Williams v. Williams, 132 Mo. App. 266; Mann v.

Digitized by Google

Railroad, 123 Mo. App. 486; Meyers v. Casualty Co., 123 Mo. App. 682; Young v. VanNatta, 113 Mo. App. 551; Hendley v. Refinery Co., 106 Mo. App. 20; Mexico v. Jones, 27 Mo. App. 534; Cornovski v. Transit Co., 207 Mo. 263; May v. Crawford, 150 Mo. 527. It was conclusively shown that Chicago was Bange's regular address, and it was not the province of the jury to pronounce the legal conclusions following from the conclusively ascertained facts. Davies v. Railroad, 159 Mo. 7; Furber v. Bolt & Nut Co., 185 Mo. 301. Even if notices of contributions were addressed and mailed to 2637 Park avenue, the same was insufficient under the defendant's laws. Hannum v. Waddill, 135 Mo. 153; Siebert v. Chosen Friends, 23 Mo. App. 272; Force v. Knights of Honor, 41 Mo. App. 117. (4) The court erred in giving defendant's instructions, and erred in refusing to give instructions requested by plaintiff. The instructions given by the court of its own motion were erroneous. Bange v. Legion of Honor, 153 Mo. App. 154; Bange v. Legion of Honor, 128 Mo. App. 461; Davidson v. Transit Co., 211 Mo. 320; Wolfe v. Supreme Lodge, 160 Mo. 675; Christian v. Ins. Co., 143 Mo. 460; Summers v. Ins. Co., 90 Mo. App. 691. (5) No presumption that a letter reached the addressee arises unless it appears that the person resided in the city or town to which the letter was addressed. Goodwin v. Assurance Society, 97 Iowa, 226. The failure to give notice as prescribed in the laws would not be excused even if Bange omitted to notify the recorder of his change of address. Wachtel v. Widows and Orphans Society, 84 N. Y. 28. The contents of a notice, including the list of deaths and the amount due upon the contribution, are as necessary to be proved as the fact of service. Burchard v. W. C. T. A., 139 Mo. App. 622; Supreme Lodge v. Johnson, 78 Ind. 110; Agnew v. A. O. U. W., 17 Mo. App. 254. (6) Acquiescence and abandonment can-

Digitized by Google

not be invoked where the suspension is void. Wayland v. Indemnity Co., 166 Mo. App. 221; Johnson v. Ins. Co., 166 Mo. App. 261.

Kinealy & Kinealy for respondent.

(1) Plaintiff's objections to the definiteness of the answer are not well founded. But even if they were, they come too late since they are waived by replying to the merits. Ewing v. Vernon Co., 216 Mo. 681. (2) The two prior opinions of this court in this case dispose of appellant's points adversely to her, and those opinions are the law of this case on this appeal. Taussig v. Railroad, 186 Mo. 269; Hayward v. Smith, 187 Mo. 464; Mill Co. v. Sugg, 206 Mo. 148; Railroad v. Bridge Co., 215 Mo. 286. (3) Defendant's law as to the payment of contributions is self-enforcing. Bange v. Sup. Council, 128 Mo. App. 461. (4) The question as to what was Bange's regular address was one for the jury. Bange v. Legion of Honor, 153 Mo. App. 154. (5) The letter written by Mr. Lindsley was no justification for Bange's failure to pay his contributions. Bange v. Sup. Council, 128 Mo. App. 461. (6) Appellant's instruction requiring notice of suspension from the recorder of Irving Council as well as from the supreme recorder was properly refused. No law required it and no established custom known to Mr. Bange to give it was shown. Such a custom would moreover have to be pleaded. Staroske v. Publishing Co., 235 Mo. 67. (7) Even if the question were here up for decision, which it is not, it would have to be held that the allegation that the contribution was duly called, is sufficient. Edwardson v. Garnhart, 56 Mo. 81. (8) Moreover, the definite and specific pleading, in plaintiff's reply, of defendant's laws as to notices and calls for contributions would supply any deficiency in that regard in the answer. Garth v. Caldwell, 72 Mo. 622; Lee v. Railroad, 195 Mo. 400; Shelton v. Rail-

Digitized by Google

road, 167 Mo. App. 404. (9) If Bange had knowledge or notice of his suspension and offered no objection or protest he thereby acquiesced therein, and hence the instruction given by the court on the subject of acquiescence was correct. Bange v. Sup. Council, 128 Mo. App. 461.

NORTONI, J.—This is a suit on a benefit certificate. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

Defendant is a fraternal association, and the defense is that the insured forfeited his membership through nonpayment of contributions prior to his death and because of which he was suspended from the order. A second defense is to the effect that, though the suspension of the insured member was illegal, he nevertheless acquiesced therein, after having received due notice of such suspension.

The case has been reviewed here on two prior appeals. We find the relevant facts to be substantially the same as those stated on the first appeal. We copy that statement here as sufficient for the purposes now in hand. [See Bange v. Sup. Council, etc., 128 Mo. App. 461, 105 S. W. 1092.]

"The insured was Julius A. Bange. He was a member of Irving Council No. 2 of the defendant order, the Supreme Council Legion of Honor of Missouri. Minnie Bange was the wife of the insured and the beneficiary of the certificate, in which the order obligated itself to pay her $2,000 on due notice and proof of the death of her husband. Bange joined the order and took out the certificate April 5, 1902. At that time he was a resident of the city of St. Louis and lived at 3546 Henrietta street. He died February 19, 1905, in Texas, while traveling there as a salesman for a Chicago business concern. Subsequently Bange moved from No. 3546 Henrietta street, St. Louis, to 2637 Park avenue. This removal was in October,

Digitized by Google

1903, and plaintiff with his family, consisting of himself, wife and child, went to live with his mother-in-law, Mrs. Hobie. Thereafter the recorder of Irving Council would sometimes call at 2637 Park avenue to collect the dues and sometimes send a written notice of a call for payment to that address. A by-law of the order provided that a notice to pay dues should be 'directed to the regular address of the member and deposited in the post office,' provided further that this should be a sufficient notice to bind a member. Contributions to the relief fund were called monthly and during the year 1904, Bange's dues were $1.39 a month. In May of that year and while still residing at 2637 Park avenue, he paid the order six dollars, which sum discharged his dues to June 30, 1904, and left thirty-three cents standing to his credit. The call due June first and payable as late as June 30th, was No. 128, and was the last call paid by Bange. During the summer and sometime, it seems, after June, Bange, being out of employment, went to Chicago to seek work. When he left St. Louis he stored his furniture in the cellar of his mother-in-law's home on Park avenue and his wife and child remained there. His wife visited him for six weeks during the summer in Chicago. Bange worked for a time in Chicago and in January, 1905, got a position as traveling salesman, his territory being in Texas. In the meantime, he had lived with his sister at No. 2094 Wilcox avenue, Chicago; that is to say, he stayed at said number from some time in July, 1904, until January, 1905, and then went to Texas. There is evidence tending to show his mail address continued to be in Chicago, or that such of his mail as came to 2637 Park avenue, St. Louis, was forwarded to his Chicago address. Mrs. Hobie swore that during the summer of 1904, after Bange had left St. Louis and while his wife was visiting him in Chicago, Malcolm A. Lindsley, the recorder of Irving Council, called once or twice at 2637 Park avenue

Digitized by Google

to collect Bange's dues and Mrs. Hobie told Lindsley Bange's Chicago address. She testified further Lindsley said the lodge would keep up the assessments for a year. It is not shown positively that Mrs. Hobie communicated this statement to Bange, but it is fairly inferable that she did. This occurred in August, 1904. In point of fact the Irving Council did pay Bange's dues for three months; that is, for July, August and September, and had previously paid his calls for April, May and June, though for the latter three months he had reimbursed the council. Such payment of dues for delinquents was in accordance not only with the custom, but with a by-law of the order. Said by-law is as follows:

" 'Each member shall pay the amount due as his contribution to the relief fund within thirty days from the date of such call, and any member failing to pay such contribution on or before the first meeting of his council after the expiration of said thirty days, shall stand suspended from the order and from all benefits therefrom: provided, however, that any council may, by a majority vote of the members present at said meeting, authorize the payment of a member's contribution as a loan or as a gift, from its general or any fund, other than the relief fund, but such payment must be made within the time herein specified.'

"There is another by-law which provided methods for the reinstatement of suspended members. Within thirty days from the date of suspension a member may file with the recorder of the council a written application for reinstatement and pay to said recorder all dues and fines in arrears from the date of suspension and thereupon be reinstated. If the suspended member waits ninety days after his suspension before seeking reinstatement, he must file a written application, accompanied by the certificate of some physician and pay up his contributions. In such instance he can only be reinstated by making an application in that

Digitized by Google

form and obtaining a favorable vote of his council. If a suspended member waits longer than ninety days before applying for reinstatement, it seems he must be elected as a new member. The testimony of Lindsley was the council usually carried a delinquent for three months or sometimes longer when solicited. On October 1, 1904, call No. 132 for contributions from members was issued and a notice of the call sent by the recorder Lindsley to Bange to No. 2637 Park avenue, so Lindsley swore, and further, that he sent a notice of said call again on November first. Lindsley is a man upwards of seventy years old. His testimony on this point is that he would write out a large number of notices of assessment, thirty or more, place them in stamped and addressed envelopes, take a batch to a mail box and deposit them. His testimony is quite positive that he mailed Bange on October and November first, notices of the call for assessment No. 132. This assessment would be $5.67 for three months' dues. Mrs. Hobie's testimony tends to prove no notice was sent; for she swore that, to her knowledge, no letters came for Bange to her home with the card of Irving Council stamped on the corner of the envelope. Lindsley testified the notices were sent out in envelopes with said card on them. Mrs. Hobie swore any mail that came to her home for Bange was forwarded to Chicago; that she told Lindsley Bange's regular address was 2094 Wilcox avenue, Chicago, and Lindsley promised to write to him at that address. The by-law of the order regarding the duties of the recorder, provided that said officer of each subordinate council should 'conduct all its correspondence.' On November 9, 1904, Bange was suspended and his suspension was entered on the minutes of Irving Council at one of its monthly meetings, for nonpayment of dues. Lindsley swore he sent a notice of his suspension to him and the supreme recorder of the Legion of Honor, whose office is at 410 Fullerton Building, St. Louis,

Digitized by Google

testified that after he was notified of the suspension by Irving Council, he, too, sent a notice of it to Bange. Both notices were addressed to 2637 Park avenue, St. Louis, Missouri. Some correspondence took place between Bange and Lindsley after the former went to Chicago. Bange must have written to Lindsley in the fore part of August, because, on the 18th of that month, Lindsley wrote to him as follows:

" 'IRVING COUNCIL NO. 2, L. OF H.
" 'Meets Second and Fourth Wednesdays Masonic Temple, Grand and Finney Avenues.
" 'M. A. Lindsley, Recorder, 3696 Finney Ave.
" 'St. Louis, 18th August, 1904.
" 'Bro. J. R. Bange,
" 'Chicago, Ill.

" 'Dear Sir: I am in receipt of your esteemed favor of recent date. Irving Council will not suspend you; it will pay your assessments for a reasonable length of time hoping that you may find employment and be able to reimburse them. Present my regards to your wife, who, I learn, is with you. After the receipt of your letter I called to see her to assure her Irving Council would treat you kindly and from her mother learned that she was with you.

" 'Fraternally,
" 'M. A. Lindsley, R.'

"That letter was offered in evidence by the plaintiff, but excluded by the court. It was in an envelope addressed as follows:

" 'J. A. Bange, Esq., Chicago, Illinois, 2094 Wilcox Avenue. Return to 3696 Finney avenue. Postmark St. Louis, August 18th, 1904, 2 p. m. Chicago postmark, August 19th, 1904, 9 a. m.'

"The court admitted the envelope in evidence. Bange never afterwards paid dues, tried to be reinstated, or participated in any way in the proceedings of Irving Council."

Digitized by Google

For a further statement, see Bange v. Sup. Council Legion of Honor, 153 Mo. App. 154, 132 S. W. 276.

Of its own motion, the court instructed the jury as follows:

"On the points of law arising in this case the court instructs you as follows:

"1. The evidence establishes that the defendant is a fraternal benefit association operating under the lodge system of government, that plaintiff is the wife of Julius A. Bange, deceased, who became a member of Irving Council No. 2 (a subordinate council of defendant), in the year 1902, that the defendant issued the certificate mentioned in the evidence and agreed to pay plaintiff the sum of $2000 on the death of her husband, provided he was a member of defendant order in good standing at the date of his death.

"Defendant order sets up a forfeiture of the membership of Julius A. Bange prior to his death on the ground of nonpayment of the October, 1904, contribution.

"Contribution for October, 1904, was not paid, and on November 9, 1904, Irving Council No. 2 declared deceased suspended and his membership in defendant order forfeited. Julius A. Bange died February 19, 1905.

"2. In order for the plaintiff to recover in this action it is not necessary for her to prove that Bange at the time of his death was in good standing in the defendant order, but on the contrary, to defeat recovery the defendant must establish by a preponderance or greater weight of the evidence that Bange was lawfully suspended on the 9th day of November, 1904, or that said Bange acquiesced in such suspension, although you may believe and find from the evidence that such suspension was illegal.

"3. Before the defendant can avail itself of the defense of acquiescence in the suspension on the part of deceased it must establish by a preponderance or

Digitized by Google

greater weight of the evidence that defendant mailed a notice addressed to Bange's regular address informing him of said suspension *or that he had notice of said suspension in some other way.*

"4. The law presumes knowledge on the part of deceased, Julius A. Bange, of the constitution and general laws of the defendant order and of the by-laws of Irving Council No. 2, which were in force during the entire time that he was a member of defendant organization.

"5. Unless you believe and find from the evidence that the recorder of Irving Council No. 2 deposited in the United States mail a notice to deceased directed to his regular address of the call of the October contribution, 1904, or that said deceased received such notice in some other manner and in time to have enabled him to pay such contribution within thirty days from the date of such notice—the limit named in the law of defendant order; and unless you further find and believe from the evidence that defendant's supreme recorder deposited in the United States mail a notice to deceased directed to his regular address informing him of his suspension on November 9, 1904, for the nonpayment of the October contribution, *or that deceased received notice of such suspension in some other manner, you will find a verdict for plaintiff.*

"12. The letter read in evidence dated August 18, 1904, signed by M. A. Lindsley, the recorder of Irving Council No. 2, was no excuse or justification for the nonpayment of the October contribution by deceased. This letter was introduced solely for the purpose of evidence relating to Lindsley's knowledge of where notice should have been sent of the call of the October contribution.

"13. Even though you may find and believe from the evidence that at the time of the death of Bange he was indebted to defendant for dues and per capita

Digitized by Google

tax you are instructed that his delinquency in these respects cannot affect the right of this plaintiff to recover in this action.

"14. Even though you may find and believe from the evidence that at the time of the death of Bange he was indebted to defendant for contributions for the months of July, August, September and December, 1904, and January and February, 1905, you are instructed that the nonpayment of said contributions for said months or for any of said months must not be taken into consideration by you in determining the question whether deceased was lawfully suspended for the nonpayment of the October, 1904, contribution.

"15. If you find for the plaintiff you will allow her the sum of two thousand dollars with interest thereon at the rate of six per cent per annum from the 18th day of July, 1905 (date of filing suit) to this date."

We have italicized portions of the instructions given by the court of its own motion, with the view of inviting attention thereto in the opinion.

At the instance and request of defendant, the court instructed as follows:

"6. The defendant's laws read in evidence required the recorder of Irving Council No. 2, of which the deceased was a member, to send notices of contributions which he was required to pay to his regular address. The words 'regular address,' as used in said by-laws, means the place where the member is known by the recorder to receive customarily his mail. That is, the place where he is known to expect his mail to be addressed to him, and where he usually receives it, although he may not always be present at such place.

"In determining whether at the time mentioned above the regular address of the deceased was at No. 2637 Park avenue, in the city of St. Louis, Missouri, or at No. 2094 Wilcox avenue, Chicago, Illinois, you are to take into consideration all the facts and circum-

Digitized by Google

stances in evidence in this case tending to show whether the deceased expected to receive regularly his mail at one place rather than at the other in the absence of any special direction, and also tending to show what knowledge or information, if any, the recorder of Irving Council No. 2 had of this intention.

"If you believe and find from the evidence in this case that No. 2637 Park avenue, in the city of St. Louis, Missouri, was the regular address of the deceased at the time mentioned above, and that the recorder of Irving Council on or about the first day of October, 1904, deposited in the United States mail postage prepaid, addressed to the deceased to such place a notice or call for a contribution due from him for the month of October, 1904, that said contribution was not paid by the deceased or by any person for him on or before the first meeting night of said council in November, 1904, and that thereupon he was suspended by said council at said meeting for the nonpayment of said contribution, and that notice of such suspension was deposited in the United States mail by the Supreme Recorder of defendant, postage prepaid, and addressed to the deceased at said number on Park avenue, in the city of St. Louis, and that thereafter the deceased made no application to be reinstated in said council prior to his death, then your verdict must be in favor of the defendant.

"7. If you believe from the evidence that on or about the first day of October, 1904, the recorder of Irving Council deposited in the United States mail, postage prepaid, and addressed to deceased, Julius Bange, at 2637 Park avenue, St. Louis, a notice or call for a contribution due from him for the month of October, 1904, and that such notice was forwarded from said Park avenue address to the deceased at 2094 Wilcox avenue, Chicago, Illinois, and was there received by him in time to have enabled him to have paid said contribution within thirty days from the

Digitized by Google

date of said notice and that he failed to make such payment and was suspended by said council at its first meeting in November, 1904, on November 9th, then the question of the regular address of the deceased is immaterial and your verdict must be in favor of the defendant.

"8. If you believe from the evidence that on or about October 1st, 1904, M. A. Lindsley, recorder of Irving Council, sent to Julius A. Bange a notice requiring him to pay contribution No. 132, within thirty days from said date, and sent said notice by mail addressed to said Bange, at 2637 Park avenue, and that that was the address to which said Lindsley had theretofore been in the habit of sending these notices to said Bange, and that said Bange knew that fact, and if you further find from the evidence that when said Bange went to Chicago about June, 1904, he did not go there with the *intention of making a permanent change in his place of residence,* but only went there for the purpose of seeking employment, and afterwards returned to St. Louis, and if you further believe from the evidence that said Lindsley, when he sent said notice to said Bange at 2637 Park avenue, did not know whether or not said Bange was in Chicago, and did not know and had no reason to know that he had gone to Chicago with an intention of remaining permanently, then the court instructs you that if said Bange neglected to pay said contribution No. 132 on or before the first meeting night of Irving Council in November, 1904, and if neither said council nor anyone else paid said contribution for him, then said Bange became suspended from membership in defendant organization, and your verdict must be for the defendant.

"9. If you believe from the evidence that on or about the first day of October, 1904, M. A. Lindsley, recorder of Irving Council, mailed to Julius A. Bange a notice, notifying him that contribution No. 132 had

Digitized by Google

been called, payable within thirty days from October 1, 1904, and sent said notice by mail to the said Bange, addressed to him at 2637 Park avenue, and that said notice was received at said address and at once forwarded by mail by the wife or mother-in-law of said Bange to him and addressed to him at 2094 Wilcox avenue, Chicago, Illinois, and was received at said Chicago address in time to have enabled said Bange to have paid said assessment within said thirty days, and that the said Bange failed to pay said assessment No. 132, and was at the first meeting of Irving Council in November, 1904, and on November 9, 1904, declared suspended from membership, then the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant, provided you further believe and find from the evidence that defendant's Supreme Recorder deposited in the United States mail a notice to the deceased directed to his regular address informing him of such suspension, *or that deceased received notice of such suspension in some other manner.*

"10. If you believe from the evidence that Julius A. Bange was declared suspended at the meeting of Irving Council held on November 9, 1904, and his suspension reported to the Supreme Recorder of defendant, and that notice of his suspension was mailed to him by said Supreme Recorder directed to him at 2637 Park avenue, St. Louis, Missouri, and that said notice was at once forwarded by mail from said Park avenue address by the wife or mother-in-law of said Julius A. Bange, to his Chicago address, No. 2094 Wilcox avenue, Chicago, Ill., and was received at said Chicago address in time to have enabled said Bange to have applied for reinstatement as a member of Irving Council, within thirty days from date of said suspension, and that thereafter he made no application to be reinstated as a member of defendant organization or of said Irving Council and neither paid nor offered to pay any assessments or dues and never did anything

Digitized by Google

indicating that he considered himself a member of said council or of defendant or indicating any desire on his part to continue such membership, then the verdict of the jury must be in favor of defendant.

"11. If Julius A. Bange in any manner obtained knowledge that he was or had been suspended from membership in the Legion of Honor, then if he did not desire to acquiesce in such suspension it was his duty within a reasonable time to make known such fact to the officers of the defendant or the officers of said Irving Council, and if you believe from the evidence that after becoming aware of said suspension from membership in Irving Council on November 9, 1904, if you find as a fact that he did so become aware thereof, he took no steps to protest against such suspension or to procure his reinstatement as such member, or in any way express to any officer of the defendant or to said Irving Council that he did not consent to such suspension then the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant."

We have italicized portions of defendant's instructions, also, with the view of inviting attention thereto in the opinion.

It appears the issues were fairly presented to the jury by the instructions given by the court of its own motion and for defendant, except in so far as the italicized portions are objectionable.

The benefit certificate, together with the established fact of the death of the insured, made a prima-facie case for plaintiff, and it devolved upon defendant, first, to show a forfeiture of the rights of the insured because of his nonpayment of contribution No. 132, after notice of its call was either made out and deposited in the United States mail, directed to his regular address, or that such notice was actually received by him through the process of forwarding, in time to have enabled him to make payment of the

Digitized by Google

contribution before the thirty days stipulated in the by-laws had expired, and that notice of his suspension was duly mailed as well; or, second, that the insured had acquiesced in his suspension from the order and to the forfeiture declared, with full knowledge of the fact, and treated the matter of his relations with defendant as an insured severed thereby.

There are two defenses set forth in the answer. The first goes to the effect that the insured, Julius A. Bange, forfeited his membership in the order and likewise his insurance through failing to pay contribution No. 132, duly called in October 1, 1904, and of which he was then notified, through the mailing of a notice thereof by the recorder to his regular address, and through the action of Irving Council No. 2, of which he was a member, on November 9th thereafter, in refusing to pay the contribution for him and declaring him suspended for nonpayment thereof, followed by a proper notice of such suspension, duly mailed him by the Supreme Recorder. This defense, if established to the satisfaction of the jury, would suffice, of course, to defeat plaintiff's suit. The second defense set forth in the answer goes to the effect that plaintiff was declared suspended by the local council as a member of the order on November 9th, for the reasons above stated, and, with full knowledge of such suspension, he thereafter acquiesced. By this defense it is sought to preclude plaintiff's right of recovery through the acquiescence of her husband in his suspension from the order, whether such suspension was regularly made or not, for the evidence tends to show that he paid no contributions thereafter and did nothing to signify his intention to continue his relations as a member of the order. The instructions above copied deal with both of these defenses and are to be viewed accordingly.

Defendant's by-law required the notice of contributions called to be mailed to the member at his

Digitized by Google

regular address, and, of course, this was a condition to be complied with by defendant before a forfeiture could be declared. After the mailing of such notice to the regular address, an insured member is entitled to thirty days in which to pay the contribution. The by-law further provided that, in event a member omitted to pay, then the local council might, by a majority vote, assume the burden and make the payment for him. The custom established goes to the effect that the local council acted on such matters at the next meeting after the contribution was called. In the instant case, the contribution was called on October first and the council acted thereon as if a failure to pay appeared on November ninth thereafter and declined to make the payment for Bange. Having so declined to make the payment for him, the council declared Bange suspended for the nonpayment of contribution No. 132. Because the by-law vested a discretion in the council to assume or not the burden of paying a contribution for a member and the custom obtained thereunder to defer action until the next meeting, we declared, on both the first and second prior appeals, that the by-law was not self-executing in operating *ipso facto* the suspension of the member at the end of thirty-day period after notice of the contribution was mailed by the recorder to his regular address. The suspension, if made, is necessarily deferred, even though the notice is mailed to the regular address of the member, by the authorized proceedings of the council under the by-law and the custom established in connection therewith, until the action of the council is had and its refusal to pay the contribution and the suspension of the member declared. [See Bange v. Supreme Council Legion of Honor, 128 Mo. App. 461, 105 S. W. 1092; s. c., 153 Mo. App. 154, 132 S. W. 276.]

There is evidence tending to show that 2637 Park avenue, St. Louis, was the regular address of Bange

Digitized by Google

and that the recorder of the local council, Lindsley, mailed the call for contribution No. 132 to him at that address, also that the supreme recorder mailed to the same address a notice of the suspension of Bange within due time after it was made. Of course, if such address—2637 Park avenue, St. Louis—was the regular address of Bange, then the notices above mentioned sufficed, whether he received them or not, for the parties may agree, and it is competent to contract, that such mailing of the notices to the regular address constitutes notice to the member. [See Hannum v. Waddill, 135 Mo. 153, 36 S. W. 616.] But it appears that Bange went to Chicago during the summer, with a view to seek employment there. It appears, too, that his wife joined him there for a time. While in Chicago, Bange received his mail at 2094 Wilcox avenue, the residence of his sister, with whom he stopped. The evidence reveals that Lindsley, the recorder, knew such to be the fact, for he wrote Bange a letter directed to his Chicago address in August. On this it is urged that we should declare as a matter of law that 2094 Wilcox avenue, Chicago, was Bange's regular address. It is conceded throughout the case that Lindsley did not direct the call for contribution No. 132, nor was the notice of suspension mailed by the supreme recorder directed to Bange at Chicago. Both of these notices were mailed, if at all, to him at 2637 Park avenue, St. Louis. However, the record abounds with evidence tending to show that Bange had abandoned 2094 Wilcox avenue, Chicago, as his regular address, for Lindsley, the recorder, testifies that Mrs. Bange, plaintiff, returned to St. Louis and told him at her mother's residence here that Bange had disappeared. It appears he and his wife were not separated and she, together with her child and the family household goods, was here at the St. Louis address when contribution No. 132 was called. In view of these facts, we declared on the second appeal that the mat-

Digitized by Google

ter of Bange's regular address was a question for the jury to decide, and we adhere to that view. [See Bange v. Sup. Council Legion of Honor, 153 Mo. App. 154, 132 S. W. 276.]

Though it appears conclusively that neither Lindsley nor the supreme recorder mailed notices to Bange at the Chicago address, it does appear that Mrs. Hobie and Mrs. Bange, residing at 2637 Park avenue, forwarded such mail as was received there for Bange to him at the Chicago address. In view of this, it was declared on the first appeal that, though the notices were not mailed to the regular address of Bange, if they were, in fact, forwarded to him at the Chicago address, 2094 Wilcox avenue, and actually received by him within time to enable his paying the contribution within thirty days after it was called and thus preserve his rights, such would suffice, for it constituted actual notice of the call. [See Bange v. Sup. Council Legion of Honor, 128 Mo. App. 461, 105 S. W. 1092.] This view was adhered to on the second appeal. [Bange v. Sup. Council Legion of Honor, 153 Mo. App. 154, 132 S. W. 276.] In so far as the instructions deal with this question, they seem to be well enough, but both those given by the court of its own motion and those given at defendant's request are objectionable in the portions italicized, relating to the notice which Bange may have received, touching his suspension from the order.

It is to be noted that two notices are required under the by-laws of the order. The first is a notice to be mailed to the regular address, but which we have said is sufficient if forwarded to and actually received by Bange, informing him of the call of contribution No. 132, provided it was received on such forwarding in time to have enabled him to make the payment within thirty days, that is, the time specified by the by-laws in which payments should be made. The second notice contemplated by the by-laws is one to

Digitized by Google

the effect that the defaulting member had been suspended by the action of the council, and, of course, this notice is to be mailed after the suspension is made. The duty of sending out this notice is cast upon the supreme recorder of the order. The by-law (thirteen) provides that within thirty days of the date of his suspension, a member may be reinstated in the order by the mere filing of a written application therefor and the payment of the contribution, dues and fines in default. No medical examination is required for such reinstatement, if applied for within thirty days. Neither is it necessary for the council to vote on the matter. However, both a medical examination and a vote of the council is to be had if an application for reinstatement is made after the expiration of thirty days and within ninety days. From this it appears that, though a member be suspended, his right of reinstatement continues for thirty days, upon mere request and by payment of the sums in default. Obviously, a forfeiture, not acquiesced in, may not be successfully sustained, unless the member has been accorded his right to a reinstatement within the thirty days prescribed in this law, for until the thirty days after suspension have expired, he may acquire his former status as a member of the order without medical examination and without submitting to the discretion of the council thereon. In this view, we declared on the first appeal that the by-laws contemplated notice of the suspension should be mailed to Bange at his regular address that he should be accorded his right of reinstatement within thirty days thereafter. We said, too, that if the notice of such suspension was not mailed to the regular address, but forwarded to him and actually received by him, it would suffice as actual notice from the order of his suspension. But all of this was said in contemplation of his right to have thirty days to procure a reinstatement if desired. [See Bange v. Sup. Council Legion of Honor,

Digitized by Google

128 Mo. App. 461, 105 S. W. 1092.] If both the notice of the call and of suspension were mailed in due course to 2637 Park avenue, St. Louis, and such address was Bange's regular address, then his right to reinstatement was concluded thereby at the end of thirty days from the date of suspension. On the other hand, if 2637 Park avenue, St. Louis, was not Bange's regular address and the notices of the call and suspension were mailed to him there and then forwarded to him at Chicago, it must appear that he actually received such notices, in order to conclude his right of reinstatement, and that he received them in time to have enabled him to exercise his right of reinstatement within the thirty days contemplated.

Instructions numbered three and five, given by the court of its own motion, are erroneous in this respect, in that they suggest the notice of suspension to Bange was sufficient, if received by him in any manner, without regard to time. Obviously the notice must, to fulfill the office of concluding a forfeiture, be an official one and emanate from the order. It will not suffice on this phase of the case, where a legal suspension is asserted and no acquiescence involved, that Bange "had notice of said suspension in some other way" or that he had notice "of such suspension in some other manner." The question here is not to be confused with that of acquiescing in a void suspension which operates as an abandonment of the order and insurance.

Instruction No. 9, given at the instance of defendant, deals with the question of the notice of the contribution No. 132 being mailed to 2637 Park avenue, St. Louis, and then forwarded to 2094 Wilcox avenue, Chicago, and is well enough in so far as this matter is concerned, but the concluding lines of the same instruction deal with the notice of the suspension to Bange and as if it was mailed to his regular address, informing him of such suspension. Then the part

Digitized by Google

italicized informs the jury that notice of suspension would suffice if received "in some other manner." This is erroneous for the same reasons as above stated. Moreover, such notice of suspension would not suffice even if it emanated from defendant and was mailed to the St. Louis address and then forwarded to Chicago, in event the St. Louis address was not the regular address of Bange, unless it was actually received by him and this, too, within the thirty days' limit prescribed to the end of enabling him to seek reinstatement in the order.

Much is said in defendant's instruction No. 8 about Bange's intention to make Chicago his home. All of this should be eliminated, for the question of regular address is not identical with that of domicile, which depends on intention. This was pointed out on the second appeal. [See Bange v. Sup. Council Legion of Honor, 153 Mo. App. 154, 132 S. W. 276.] The words "regular address" refer to the place where the member would be likely to get his mail, as was said on the first appeal. [See Bange v. Sup. Council Legion of Honor, 128 Mo. App. 461, 105 S. W. 1092.]

It is urged that defendant's instruction No. 11 is erroneous, but we are not so persuaded. This instruction pertains alone to the second defense set forth in the answer—that is, it treats with the matter of Bange's acquiescence in his suspension from the order and that, too, even though it was void for the omission to give the required notices pertaining to the call of contribution No. 132. When the case was here on the first appeal, the court thus expressed its view on the question of a void suspension and an acquiescence therein.

"It is the doctrine of this court, as well as of the tribunals of other jurisdictions, that by remaining silent after he is notified of a void expulsion or suspension, a member of a fraternal society will forfeit his rights in the society, including his insurance. This

Digitized by Google

is because the existence of such associations depends on the prompt payment of dues, and they would be destroyed if members were allowed, after a suspension technically invalid, to retain their insurance without paying assessments. As has been pointed out in other opinions such a rule would put a suspended member on a better footing than an active one, because the former would continue to enjoy his insurance without paying for it; whereas the latter would pay. Bange died in March, 1905, four or five months after his suspension and seven months after he had paid any dues. If he received notice of the action of the council and did nothing in the premises, nor treated himself as a member of the order and bound to contribute to its burdens, no recovery can be had on his benefit certificate. [Glardon v. Sup. Lodge, 50 Mo. App. 45; Miller v. Grand Lodge, 72 Mo. App. 499; Supreme Lodge v. Wilson, 66 Fed. 785.]" [See Bange v. Sup. Council Legion of Honor, 128 Mo. App. 461, 475, 105 S. W. 1092.]

Instruction No. 11 was given in conformity with this view, for it appears that, though Bange lived four or five months after his suspension, he paid no other contributions or dues nor did anything signifying an intention to further affiliate with the order. The principle pertaining to the abandonment of one's rights under his certificate of insurance, through acquiescing in a void suspension, proceeds in accord with the precepts of mutual duty which obtains between the co-contributors to the insurance fund and in support of the order. It is said that, even when an expulsion or suspension of a member is void, he is nevertheless under a duty to his co-contributors to affirm or disaffirm the act of expulsion or suspension within a reasonable time, and this, too, in some distinct manner under the circumstances. [See Mulroy v. Sup. Lodge, 28 Mo. App. 463; 1 Bacon, Benefit Societies (3 Ed.), 104; Slater v. Sup. Lodge, 76 Mo. App. 387; Lavin v.

Digitized by Google

Grand Lodge, 112 Mo. App. 1, 86 S. W. 600.] Therefore, where such suspended member takes no step of any kind to secure his reinstatement, allows contributions which had accrued and were payable prior to the date of his expulsion to remain unpaid, and neither tenders such contributions nor any subsequently accuring contribution and dues, he must be treated as having acquiesced in and consented to the sentence of expulsion or suspension and thereafter abandoned the order and his insurance contract therewith. [See 1 Bacon Benefit Societies (3 Ed.), sec. 104, and authorities supra.]

But it is urged defendant's instruction No. 11 authorizes the jury to find an acquiescence on the part of Bange in a void suspension, even though he received no notice directly from the order that he was suspended. The matter of a void suspension presupposes, of course, irregularities throughout, and among other things that a notice of such suspension was not transmitted to the insured as it should have been. This being true, the instruction should not be condemned for failing to require the jury to find the insured had received notice of suspension from the order directly, for if he actually knew the fact pertaining to it and acquiesced therein, through discontinuing the payment of contributions or further attempting to affiliate, and by treating the insurance contract as abandoned, it is immaterial how such knowledge was obtained. It is to be observed that instruction No. 11 requires the jury to find that Bange received "knowledge" of the fact of the suspension and was thereafter "aware" of it. These words as employed in the context imply, of course, that the insured knew the fact of his purported suspension, which, of course, is more than to say he had heard a mere rumor to that effect.

There can be no doubt that, if Bange knew that he was declared suspended as for the nonpayment of contribution No. 132, and with this knowledge thereafter

Digitized by Google

acquiesced therein until he died, four or five months later, such acquiescence should be treated as an abandonment by him of his rights in the premises, and this, too, notwithstanding he acquired such knowledge of the suspension from some other source than the order itself. In this connection see Konta v. St. Louis Stock Exch., 189 Mo. 26, 87 S. W. 969, where it appears the expelled member was declared to have acquiesced in his expulsion after having received notice from a friend, who merely told him of it, and without it appearing that notice was conveyed to him to that effect by the association.

An amended answer was filed in the case after its remand on the former appeal. The averments of fact in this answer are meager. It should be enough to merely suggest an amendment. If defendant is so advised, it may file an amended answer before a retrial of the cause.

For the errors in the instructions above pointed out, the judgment should be reversed and the cause remanded. It is so ordered. *Allen, J.*, concurs; *Reynolds, P. J.*, not sitting.

EMIL C. GOLLER, Respondent, v. HENSELER MERCANTILE OIL AND SUPPLY COMPANY, Appellant

St. Louis Court of Appeals, December 2, 1913.

1. **CONTRACTS: Parol Evidence: Varying Written Contract.** All prior conversations and negotiations with respect to the subject-matter of a contract in writing are, in the absence of fraud, accident or mistake, merged in the contract.

2. **MASTER AND SERVANT: Breach of Contract of Employment: Rebating.** A contract of employment, which required the employee to get the market price for oil sold for the employer, and which obligated the employer to pay the employee a stipulated amount for oil sold by him, was breached by sales made by the employee at the market price but under an agree-

Digitized by Google

ment with his customers that he would refund them five per cent of his commission, justifying his discharge.

3. **CONTRACTS: Modification: Action for Breach.** A contract may be modified after it is executed, by varying its terms, or by adding new terms; but, in such a case, a recovery for a breach is to be had upon the original contract and the subsequent modification, declared upon as a whole.

4. ———: **Parol Modification.** A written contract may be modified by a new parol contract subsequently entered into.

5. ———: **Parol Evidence: Varying Written Contract.** In an action on a written contract, parol evidence of an additional agreement, varying the terms of the written contract, made contemporaneously with it, is not admissible, except where the contract reveals on its face that it is incomplete with respect to the additional term sought to be supplied by the parol evidence.

6. ———: ———: ———. In an action for the discharge of an employee, who was employed to sell oil for defendant under a written contract which required him to sell at the market price, where defendant pleaded justification for the discharge, in that plaintiff had sold oil under the market price, by giving his customers a certain rebate out of his commission, *held* that evidence offered by plaintiff, to the effect that defendant agreed at the time the written contract was executed, and prior thereto, to permit him to give a rebate to his customers out of his commission, was incompetent, for the reason that it was a contradiction of the terms of the written contract.

6. ———: **Action for Breach: Pleading: Variance.** In an action for the breach of a written contract, a recovery cannot be had for a breach of the written contract as modified by a parol agreement subsequently made.

7. ———: **Modification: Consideration.** A consideration is required to support a new contract which modifies the terms of an existing contract.

8. **MASTER AND SERVANT: Breach of Contract of Employment: Rebating.** Under a contract of employment requiring the employee to get the market price for oil sold for the employer and obligating the employer to pay a commission for oil sold, the employer was justified in discharging the employee for giving rebates out of his commission to his customers, as a result of which the oil was sold for less than the market price, where the employer, after having given the employee permission to rebate in this matter, notified him to discontinue the practice, and he refused to do so.

Digitized by Google

Appeal from St. Louis City Circuit Court.— *Hon. J. Hugo Grimm*, Judge.

REVERSED AND REMANDED.

Johnson, Rutledge & Lashly for appellant.

(1) In an action brought on a special written contract, no verbal contract being pleaded, recovery cannot be had upon a contract, part of which is in writing, and other parts resting in parol. Koons v. Car Co., 203 Mo. 227; Smith v. Shell, 82 Mo. 219; Henning v. Ins. Co., 47 Mo. 425. (2) In a suit upon a written contract, all prior and contemporaneous negotiations, conversations and agreements are merged in the writing. Mills & Elev. Co. v. Adams El. Co., 115 Mo. App. 542; Morgan v. Porter, 103 Mo. 135; McFadden v. Railroad, 92 Mo. 343; Bank v. Cushman, 66 Mo. App. 102; Huber Mfg. Co. v. Hunter, 87 Mo. App. 50; Loan & Trust Co. v. Whitman, 71 Mo. App. 275; Walker v. Engler, 30 Mo. 130; Tracy v. Union Iron Works, 104 Mo. 193; Cole v. Armour, 154 Mo. 350; Boyd v. Paul, 125 Mo. 9; Seitz v. Brewers Co., 141 U. S. 510; Ringer v. Holtsclaw, 112 Mo. 523; Parker v. Vanhoozer, 142 Mo. 627. (3) Executory contracts may be modified by mutual consent, and, that, too, without additional consideration. 35 Cyc. 124; Pottery Co. v. Folekemer, 131 Mo. App. 105; Henning v. Ins. Co., 47 Mo. 431. (4) The refusal of a servant to obey the reasonable orders of his master is good ground for his discharge. 26 Cyc. 992, et seq.; McCann v. Desnoyers, 64 Mo. App. 66; Linder v. Brewery & Ice Co., 131 Mo. App. 68.

H. Chouteau Dyer for respondent.

(1) The contract sued upon was properly pleaded. It was signed by one of the parties and accepted and acted upon by the other party. Berner v. Bagnell, 20 Mo. App. 543; Stone v. Pennock, 31 Mo. App. 544; Am.

Digitized by Google

Pub. & Engr. Co. v. Walker, 87 Mo. App. 503; Sunbury v. Aaron, 136 Mo. App. 222; Brown v. Smith, 113 Mo. App. 59; Burriss & Haynie v. Railroad, 105 Mo. App. 659. (2) Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. The parties to the contract in the case at bar determined for themselves what should be considered as sales made by the plaintiff and this construction being entirely reasonable will be adopted. Krey v. Hussmann, 21 Mo. App. 343; Mathews v. Danahy, 26 Mo. App. 660; Gas Light Co. v. City, 46 Mo. 128; Rose v. Carbonating Co., 60 Mo. App. 28; Belch v. Miller, 32 Mo. App. 387. (3) The statements of witness Pauley were made by him while in the employ of the defendant. They were statements made by an agent acting within the scope of his authority and about the business of his principal and concerning such business. Lumber Co. v. Kreeger, 52 Mo. App. 418. (4) (a) The plaintiff was an agent, not a servant, of the defendant. He was employed to establish contractual relations between his principal and third persons. 31 Cyc. 1192. (b) A servant has been defined as "a person employed by another to render personal services to the employer." In re Grocery Co., 96 Fed. 183. (c) And again as "one who does work under the direction of another who not only precribes to the workman the nature of his work, but directs or at any moment may direct the means also or as it has been put retains the power of controlling the work." Powers v. Hospital, 109 Fed. 294. (d) The general rule that a principal has the right to revoke an agent's authority has its exceptions, like other rules of conduct, and one of the chief exceptions is where the time is definitely fixed for the continuation of the agency. 1 Clark & Skyles Law of Agency, p. 391. (e) The contract in the case at bar was for a fixed period of one year and no right to revoke it was reserved. The

Digitized by Google

plaintiff is entitled to recover what, if anything, was earned and unpaid prior to the breach and in addition such damages as he may have sustained by reason of the breach. 1 Clark & Skyles' Law of Agency, p. 826, sec. 365; Boland v. Quarry Co., 127 Mo. 520; Hichborn Co. v. Bradley, 117 Iowa, 130. (5) The defense attempted to be interposed and insisted upon in defendant's brief is to the effect that another and different contract than the one pleaded was the real contract between the parties; that plaintiff agreed to a modification of the original or written contract and subsequently breached this contract as modified. Such a modification as claimed by defendant should have been pleaded in its answer. 9 Cyc. 732; Bunce v. Beck, 43 Mo. 266; Henning v. Insurance Co., 47 Mo. 425; Riggins v. Railroad, 73 Mo. 598. (6) A modification of the contract, such as claimed by the defendant, needs a valid consideration for its support. The modification as claimed would amount to a rescission of the original contract and to become available as a defense it should have been pleaded. Riggins v. Railroad, 73 Mo. 598.

NORTONI, J.—This is a suit for damages accrued through the breach of a contract of employment and as for the wrongful discharge of plaintiff. Plaintiff recovered and defendant prosecutes the appeal.

Defendant is a corporation engaged in the oil business in St. Louis, and plaintiff is an experienced salesman of that commodity. Defendant, desiring to install a tank wagon service for the sale of oil, employed plaintiff, who possessed considerable experience in that line, for a period of one year, and entered into a written contract with him to that effect, on the twenty-seventh day of January, 1911. By the terms of the contract, plaintiff was to receive a commission on the oil sold through his efforts, and he guaranteed to defendant that he would sell no less than an average of 15,000 gallons per month, the sales to be made at mar-

Digitized by Google

ket prices of the oil at all times of the year. It appears that plaintiff entered upon the employment immediately, and induced three experienced tank wagon men to quit the employ of other companies and enter that of defendant under his supervision in selling the oil. It seems that by their course of conduct the parties construed the contract of employment as authorizing the employment of the three tank wagon men to sell and deliver the oil under plaintiff's supervision. The case was tried throughout on this theory, and it appears defendant paid a salary to the drivers of the tank wagons, while plaintiff paid to them a portion of his commissions on sales as well. Plaintiff went about and solicited the customers to whom the tank wagon men delivered the oil and thus made the sales contemplated in the contract of employment. Through this method plaintiff sold and delivered more than an average of 15,000 gallons of oil per month during February, March, April and May, but he was discharged by defendant on June second.

The suit proceeds on the theory that plaintiff fully performed the conditions of the contract on his part until his discharge, and that such discharge was wrongful. As a justification of the discharge, defendant insists that plaintiff did not obtain the market price for the oil, in that he instituted a system of rebates whereby he returned to each customer five per cent of his commissions received on sales, and refused, on request, to desist from this practice. The entire controversy between the parties pertains to this matter, and the principal argument for a reversal of the judgment relates to the action of the court in permitting plaintiff to prove by parol, as a part of his contract of employment, that defendant agreed he should do so and to recover thereon as if such were a term of the contract said to be breached by defendant. The contract of employment is in writing, and the petition declares upon that alone, assigning its breach through the

Digitized by Google

wrongful discharge of plaintiff on June second by defendant. The contract declared upon and introduced in evidence, omitting signature, is as follows:

HENSELER MERCANTILE OIL & SUPPLY COMPANY.

St. Louis, Mo., January 27, 1911.

"We, the undersigned, do hereby agree to pay Mr. Goller the following commission on sales of refined oils and gasoline for the period of one year, to-wit:

40-41 Coal oil 1 3-8c per gal.

43-44 Coal oil 2c per gal.

Stove gasoline 1 5-8c per gal.

All other grades of gasoline and coal oil 50 per cent of the gross profits as per books open to Mr. Goller at any time.

Mr. Goller, on his part, to guarantee us an average sale of not less than 15,000 gallons per month, he to get the market prices for the above goods at all times during the year."

It is obvious that there is no provision contained in this writing by which plaintiff is authorized to induce the sale of defendant's oil through rebating a portion of his commissions to his customers, but, on the contrary, the contract in express terms provides that plaintiff is "to get the market prices for the above goods at all times during the year." Moreover, the petition contains no averment to the effect that this contract was subsequently modified by another agreement authorizing plaintiff to give rebates to his customers. Neither is there an averment in the petition to the effect that a further agreement in parol was made contemporaneously with the writing to that effect. But, as stated, the petition declares upon the written contract above copied only and for its breach through an alleged wrongful discharge of plaintiff.

Notwithstanding the petition declares upon the written contract, the court permitted plaintiff, over the objection and exception of defendant, to introduce

Digitized by Google

evidence tending to prove that, immediately before and at the time the written contract was entered into, Mr. Nobbe, president of defendant company, agreed plaintiff might rebate his customers, out of his commissions, by way of an inducement to them to purchase defendant's oil. Plaintiff testifies such to be the fact, and he says, too, that about a week after the contract was entered into, he and Mr. Nobbe again talked the matter over and this course was agreed upon. Touching this matter Mr. Nobbe says that, during the next week after the written contract was entered into, plaintiff approached him upon the subject, and he stated that he had no objection to plaintiff's rebating his customers, provided defendant company got the amount due it according to the market price, less plaintiff's commissions, for the oil. However, it is insisted, on the part of defendant, that no new contract was made at the time touching this matter nor a modification of the prior one, but rather a mere permission was given by defendant company to plaintiff to pursue that course, if he chose to do so. It is conceded throughout the case that plaintiff did enter into an agreement with all of his customers to whom the oil was sold, by which he agreed to, and actually did, return to them five per cent of his commissions received on sales to each. The business was thus conducted during the months of February and March and, indeed, throughout April and May, but in April other oil companies complained of the practice as an unfair one. Indeed, Mr. Nobbe testifies that the Waters-Pierce Oil Company and the Bell Oil Company, who had learned of plaintiff's rebating his customers, insisted that the practice must be discontinued, as it operated to impair the selling price. Upon being thus advised of the objections by and on the part of competing companies, Mr. Nobbe says he notified plaintiff that he must "cut out" his rebates to customers and that plaintiff agreed to do so.

Digitized by Google

Mr. Nobbe explains in his testimony that, though he had given his permission to plaintiff and acquiesced in the matter about a week after the contract of employment was made, he could not tolerate it over the objections of his competitors. He says that both the Waters-Pierce and Bell Company were large concerns, while his company was a small one, and that they would crush him if the practice were continued by plaintiff. According to the evidence for defendant, plaintiff agreed to quit rebating but did not do so. It appears, without contradiction, that plaintiff continued the practice throughout the month of May, after having been notified by defendant not to do so, and told Mr. Nobbe on June second that he could not quit it as his customers insisted upon having rebates. Upon being thus informed by plaintiff that he would not quit giving the five per cent rebate to his customers, on June second, Mr. Nobbe summarily discharged him as if plaintiff had breached his contract of employment.

The contract by which plaintiff was employed as a salesman for defendant is in writing and there is nothing upon its face suggesting it to be incomplete in itself or that it does not purport to be a complete expression of the entire contract. Indeed, it is declared upon in the petition as the contract between the parties, and it is certain that it is such, for all prior conversations and negotiations with respect to the same subject-matter are, in the absence of fraud, accident or mistake, of which there is no suggestion here, regarded in the law as merged in the writing. [Morgan v. Porter, 103 Mo. 135, 15 S. W. 289; Flanagan Mills Co. v. Adams Grain Co., 115 Mo. App. 542, 90 S. W. 1035.] This contract in express terms imposes upon plaintiff the duty to obtain the market prices from his customers for the oil sold by him. The last clause of the writing imposes the obligation that "he (plaintiff) to get the market prices for the above goods at all times during the year." Of course, if he sold the goods to

Digitized by Google

his customers at the market price and collected the full amount therefor but under an agreement that he would refund to them five per cent of his commission, this obligation was breached, for though he obtained the full measure of compensation to which defendant was entitled, less commissions, he nevertheless indirectly made the sale to his customers for less than the market price. It is obvious that this provision of the contract referred to the market price at which plaintiff was to sell the oil to his customers and not to the price at which defendant was to furnish the oil to him for sale to them. This being true, there can be no doubt that defendant was justified in discharging plaintiff from its service for breaching this stipulation of the contract, unless it be the right to do so was vouchsafed in a modification of the contract, made subsequent to its execution.

It is, of course, true that parties may modify an existing contract after it is executed by adding new terms or varying prior terms imposed thereby. But in such cases, the recovery is to be had upon the original contract and the subsequent modification declared upon as a whole, for it is the breach of the entire contract thus modified which gives rise to the cause of action. [See Lanitz v. King, 93 Mo. 513, 518, 519, 6 S. W. 263; Henning v. U. S. Ins. Co., 47 Mo. 425.] While it is no doubt true that a contract expressed in writing may be subsequently modified by the parties through entering into a new one, which lies in parol alone, it is certain that one may not recover as for the breach of a contract expressed in writing, by showing an additional agreement thereto varying its terms, made contemporaneously with the execution of the written contract, by parol, except it be in those cases where the writing reveals on its face that it is incomplete with respect to the additional term sought to be supplied in parol. [See Koons v. St. Louis car Co., 203 Mo. 227, 255, 101 S. W. 49; Henning v. U. S. Ins.

Digitized by Google

Co., 47 Mo. 425.] There is nothing in the written contract sued upon suggesting it to be incomplete with respect to the price at which plaintiff was to sell the oil, for it expressly requires him to obtain the market price. It is therefore obvious that the court erred in permitting him to give evidence to the effect that, at the time the contract was made and immediately prior thereto, in the conversation pertaining to the subject-matter, defendant agreed plaintiff might sell the oil for less than the market price through the medium of an arrangement whereby he should rebate five per cent of his commissions to the customers.

Moreover, the court erred, too, in submitting this matter to the jury as a predicate of liability as for a breach of a term of the contract, first, because it was not declared upon in the petition, and, second, for the more obvious fundamental reason that it authorized a recovery as for the breach of a parol contract made contemporaneously with a written contract between the same parties touching the same subject-matter which contradicted and varied the terms of the writing.

So much of plaintiff's instruction as is pertinent to this matter will be copied here. The instruction is extended, and, for the purpose of brevity, other portions will be omitted. Concerning the matter in judgment, the instruction reads:

"The court further instructs the jury that if you find and believe from the evidence that the plaintiff and defendant entered into the contract read in evidence, that *at the time they entered into the contract it was understood and agreed between them* that plaintiff should, in order to secure and hold customers, be permitted to pay to those purchasing oil through him a rebate or discount out of his commissions equal to five per cent of the amount of their purchases, etc., etc." the finding should be for the plaintiff, provided the jury further found defendant received the market price

Digitized by Google

for the oil, and the discharge of plaintiff. (Italics are our own.)

This instruction is, of course, erroneous for that, as before said, it submits a predicate of liability as for a breach of a verbal contract not set forth in the petition in any way, and further because it authorizes a recovery for the breach of a verbal contract revealed in the evidence to have been made contemporaneously with the writing and contradictory thereof. The instruction seems to assume, too, that the words of the contract requiring plaintiff to get the market price for the oil at all times during the year to have been fully complied with if he received less than the market price therefor but caused defendant to be paid the amount due it after his commissions were deducted. Obviously, such was not the intention of the parties as revealed on the face of the contract, for it says nothing about the price defendant was to receive, but on the contrary expressly requires that he, the plaintiff, get the market prices for the oil, and, of course, thereafter defendant would compensate him by way of commission thereon.

The court refused to instruct, at the request of defendant, that the giving of rebates, after they were forbidden by defendant's president, justified the discharge, in that it operated a breach of the stipulation requiring plaintiff to obtain the market price for the goods, and instructed of its own motion on this question as follows:

"The jury are instructed that if you find and believe that defendant employed the plaintiff as a salesman, but that it was not agreed between them at the time of the employment of the plaintiff that the plaintiff should be permitted to pay customers a rebate or discount of five per cent on the amount of their purchases out of his commissions, then defendant had the right to refuse to permit plaintiff to make such rebates even out of his own commissions, and in that case if you

Digitized by Google

find that defendant instructed plaintiff not to allow rebates or discounts to customers and plaintiff nevertheless continued to do so and refused to discontinue the practice, then defendant had the right to discharge him, and your verdict must be for the defendant."

This instruction is erroneous, too, in that it assumes as a matter of law that an agreement touching the subject of the five per cent commission made contemporaneously with the written contract was valid and enforceable though it varied and contradicted the terms of such writing.

There can be no doubt that, if the parties actually made a new contract covering this matter after the written contract was made and thereby modified the terms of the contract theretofore expressed in writing, such modified contract should prevail. However, that matter, it seems, was not relied upon in the case, though there is some evidence tending to prove it. But the consideration for a new undertaking is not developed, and, of course, such is required. [Henning v. U. S. Ins. Co., 47 Mo. 425; Bunce v. Beck, 43 Mo. 266.] If the case is retried and the petition amended, more may be made to appear. On the other hand, if it appears that defendant merely granted permission to plaintiff to give rebates from his commissions and thereafter revoked the license and directed him to discontinue the practice, which he declined to do, it was, of course, justified in the discharge, for in such circumstances it appears plaintiff breached the contract by continuing the practice from and after notification on the part of his employer to quit it.

The judgment should be reversed and the cause remanded, but with leave to plaintiff to amend, if he be so advised. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

ALBERT L. REEVES, Respondent and Appellant, v. FRANK J. LUTZ, Appellant and Respondent.

St. Louis Court of Appeals, December 2, 1913.

1. **PHYSICIANS AND SURGEONS: Care Required.** A surgeon is not required to exercise extraordinary care in performing an operation, but is required to exercise the care, skill and diligence that are ordinarily possessed by the average members of his profession who are in good standing in similar localities, regard being had also to the state of medical and surgical science at the time.

2. ———: **Malpractice: Question for Jury.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, the mere fact that all of the expert witnesses who testified agreed that burns frequently occur from the use of the hot water bag under such circumstances was not sufficient to conclude the question of defendant's liability as a matter of law, in view of the fact that an ordinary inspection of the bag would have revealed the probabilities of its causing a burn.

3. **NEGLIGENCE: What Constitutes.** The mere fact that all men are careless at times does not relieve any person from performing his duties with due care in the circumstances of the case.

4. **PHYSICIANS AND SURGEONS: Malpractice: Sufficiency of Evidence.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, and maintained in that position for two hours, *held* that defendant should have made an inspection to ascertain whether an injury was being inflicted by the bag, and hence the question of whether or not he was negligent was for the jury.

5. ———: ———. A surgeon following the usual practice of placing hot water bags against the patient to sustain circulation during an operation, is bound to exercise ordinary care with respect to the use of the bags, as well as with respect to the operation itself.

6. ———: ———: **Instructions.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, while there was evidence that patients sometimes struggle while undergoing an operation so as to bring parts of the body in contact

Digitized by Google

with the bags, resulting in burns, there was no such evidence as to the particular patient, but on the contrary, the undisputed evidence established that defendant himself placed the bag against plaintiff. At the instance of defendant, the court instructed the jury that if defendant exercised reasonable skill and care in the operation, plaintiff could not recover, although, during the operation, the hot water bag came in contact with her body and caused a burn. *Held*, that the instruction was misleading, as implying that defendant discharged his full duty if he used proper care in performing the operation, since it was essential that defendant also exercise the usual skill and care with respect to preventing a burn from the hot water bags. *Held, further*, that the instruction was misleading, as indicating that the hot water bag accidentally came in contact with the patient.

7. ———: ———: ———. In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, an instruction that the fact that defendant may have been guilty of inadvertence in the use of the hot water bag would not justify a verdict for plaintiff unless such inadvertence amounted to failure to use ordinary care and skill, was misleading, as charging that, although defendant was negligent, something more than such negligence was essential to make him liable; "inadvertence" itself signifying inattention and negligence.

8. **NEGLIGENCE: Degrees of Negligence.** Degrees of negligence are not recognized in this State.

9. **PHYSICIANS AND SURGEONS: Malpractice: Negligence: Instructions: "Accident."** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, where it was shown that defendant himself placed the bag, an instruction that if the burn was the result of an accident, and not of defendant's negligence, plaintiff could not recover, was misleading, as submitting a theory of the case not justified by the evidence; the word "accident" meaning the happening of an unforeseen event, and not the happening of an event which defendant was bound to foresee.

10. ———: ———. It is negligence for a surgeon to insert a drainage tube in a wound and allow such wound to completely heal up over the tube so as to require a surgical operation for its removal.

11. **APPELLATE PRACTICE: Trial Practice: Conflicting Evidence: Question for Jury: Review.** The credibility of the witnesses and the weight of their testimony are for the jury,

Digitized by Google

and none the less so because the evidence preponderates in favor of one party; and if there is substantial evidence tending to support the theory advanced by the party recovering, it suffices, and a finding thereon is conclusive.

12. ———: **Trial Practice: Objections to Evidence.** A general objection to the reception of evidence is not a sufficient predicate for an assignment of error, on appeal, if such evidence was competent for any purpose; and this is especially true where the objection amounts to no more than that the evidence is immaterial.

13. **PHYSICIANS AND SURGEONS: Malpractice: Pleading: Setting Out Contract of Employment.** In an action against a surgeon for malpractice, it is proper to set out the contract of employment as matter of inducement.

14. ———: ———: **Evidence: Amount of Fee.** In an action against a surgeon for malpractice, where the petition properly set forth the contract of employment as matter of inducement, and then proceeded as in tort for defendant's negligence, and defendant's answer denied the employment so pleaded, evidence as to the amount of fee paid defendant by plaintiff was competent, as tending to prove the employment, and, although it might properly have been excluded on other grounds, it was admissible as against a general objection.

15. **DAMAGES: Husband and Wife: Loss of Consortium: Evidence.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant, evidence by the husband as to the pain suffered by the wife was admissible, since it would be difficult to establish his damages without evidence of the pain suffered by the wife, as a result of which he was deprived of his marital rights.

16. **HUSBAND AND WIFE: Right of Action by Husband: Loss of Consortium.** The husband's right of consortium at common law includes the right to the services of the wife to be rendered him, together with the right to her society and the comfort incident to her companionship, for the wrongful deprivation of which he may recover, although the wife was not accustomed to do any physical labor for him and although the pecuniary value of such services can not be accurately ascertained.

17. **DAMAGES: Evidence.** The law never requires pecuniary proof with reference to a non-pecuniary loss.

18. ———: **Husband and Wife: Loss of Consortium: Evidence.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the

Digitized by Google

alleged negligence of defendant, evidence that the wife was disabled from performing the duties of a housewife and that the husband was obliged to employ another woman to keep house for him warranted the submission of the value of such services to the jury, although there was no direct proof of such value.

19. ———: **Instruction on Measure of Damages: Waiver of Generality.** Where the instruction on the measure of damages is correct in its general scope, defendant waives the right to complain of its generality if he does not ask for a limiting instruction.

20. **DAMAGES: Husband and Wife: Loss of Consortium: Excessiveness of Verdict.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant surgeon in treating a wound left by a surgical operation performed by defendant, *held* that a verdict for $1500 was not excessive. [Reynolds, P. J., *dubitante.*]

21. **APPELLATE PRACTICE: Cross Appeals: Affirmance on One Count and Reversal on Another: Disposition of Case.** In an action for personal injuries, where a verdict was rendered for plaintiff on one count of the petition and for defendant on the other count, and, on appeal, the verdict for plaintiff was upheld and the verdict for defendant was set aside, *held* that the cause should be remanded to the trial court with directions to hold the verdict for plaintiff in abeyance until a verdict is rendered on the other count and then render a final judgment covering both counts.

Appeal from St. Louis City Circuit Court.—*Hon. William B. Homer,* Judge.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Edwin Silver, Morton Jourdan and *John Cashman* for appellant, Frank J. Lutz.

(1) The law does not make a physician or surgeon an insurer against injury which may result to the patient from the treatment given. The law only requires that the surgeon shall bring to his case that degree of skill ordinarily possessed by the average of his profession in the particular locality or community in which

Digitized by Google

he renders the particular service; that he will exercise ordinary care in performing the operation and administering treatment; that in all matters of doubt he will exercise his best judgment as to the course he shall pursue, and will follow the methods and remedies generally recognized as proper in the particular school of learning to which he belongs. When these things are done, all responsibility of the surgeon ceases. The only exception is in cases of express contracts for specific results. Hales v. Raines, 146 Mo. App. 241; McClarin v. Grenzfelder, 147 Mo. App. 478; McMurdock v. Kimberlin, 23 Mo. App. 523; Gore v. Brockman, 138 Mo. App. 237; Longan v. Weltmer, 180 Mo. 322; Granger v. Still, 187 Mo. 197; Almond v. Nugent, 34 Iowa, 300; Smothers v. Hanks, 34 Iowa, 286; Peck v. Hutchinson, 88 Iowa, 320; Wurdeman v. Barnes, 92 Wis. 178; Graves v. Graff, 77 Wis. 178; Ransdall v. Grady, 97 Me. 322; Howard v. Grover, 28 Me. 100; Feeney v. Spalding, 98 Me. 111; Wenger v. Calder, 78 Ill. App. 275; Kruger v. Caughey, 149 Ill. App. 440; Doyle v. Owen, 150 Ill. App. 411; Dorris v. Warford, 30 Ky. Law. Rep. 963; Craig v. Chambers, 17 Ohio St. 253; English v. Free, 205 Pa. 624; Carstans v. Hanselman, 61 Mich. 426; Tefft v. Wilcox, 6 Kan. 46; Burnham v. Jackson, 1 Colo. App. 237; Staloch v. Holm, 100 Minn. 276; Williams v. Poppleton, 3 Ore. 139; Sly v. Wilbeur, 49 N. J. L. 685; Grainger v. Still, 187 Mo. 197. (2) Plaintiff's instruction number five, on the measure of damages, is erroneous in that it included in the damages which the jury may allow the loss of the services of the wife, though the amount of such loss was neither pleaded nor proven. Hendricks v. Butcher, 144 Mo. App. 675; Nelson v. Railroad, 113 Mo. App. 659; Wallack v. Transit Co., 123 Mo. App. 161; Graefe v. Transit Co., 224 Mo. 675. (3) The verdict is grossly and outrageously excessive, and is wholly unsupported by the evidence. (4) It was error to permit plaintiff

Digitized by Google

to testify as to the amount paid defendant for performing the operation. There was no claim for the return of this amount, which is an implied concession and admission that the operation was properly done. This character of testimony could serve but one purpose in the condition of the pleadings in this case; that is, to create a prejudice against defendant, and it was error to admit it. It was error to permit the plaintiff to testify regarding the pain and suffering of his wife at all. The court having admitted this evidence, committed further error in failing to limit its scope by proper instructions to the jury. There was no right of recovery in plaintiff for the pain and suffering of his wife, and this evidence had but one effect, and that was to excite the sympathy of the jury for the plaintiff in their prejudices against defendant.

Douglas W. Robert, for Albert L. Reeves (respondent and appellant); *Robert & Robert* of counsel.

(1) (a) Instruction No. 1 for defendant was erroneous in that it used the words in regard to this hot water bag, "came in contact with her person," and ignored the evidence of Miss Hazard that Dr. Lutz placed the bag himself and Dr. Lutz's admission that he did it deliberately. (b) Instruction No. 2 for defendant was erroneous in instructing the jury "that the fact that Dr. Lutz may have been guilty of inadvertence," would not justify a verdict for the plaintiff. He deliberately placed the bag upon Mrs. Reeves' leg and the bag was so hot it burned her. It was negligence to so use such a bag. (c) Instruction No. 3 for defendant was erroneous for the same reason. There was no testimony that burn was "the result of an accident." Dr. Lutz placed it there intentionally and his act was negligent. (d) Instruction No. 4 for defendant contained the same vice as Instructions No. 2 and 3, and is a repetition and accentuates the error. (2)

Digitized by Google

These instructions are conflicting, confusing and inconsistent. They both refer to the burn as an "accident" and as an "inadvertence." These are not synonyms. Funk & Wagnall Standard Dictionary; Davis v. Steuben, 19 Ind. App. 694; Russell v. Colyar, 51 Tenn. 154, 176. (3) These instructions are also conflicting and confusing in that they told the jury that the fact that the defendant may have been guilty of inadvertence (which is want of care; inattention; oversight; mistake; lack of heedfulness or attention), yet the plaintiff could not recover if the jury found that defendant used the same care and skill of ordinary skillful and careful surgeons. Instructions should not be inconsistent or contradictory. Sheperd v. Transit Co., 189 Mo. 373; Mansur v. Ritchie, 143 Mo. 587; Spillane v. Railroad, 111 Mo. 565; Stone v. Hunt, 94 Mo. 475; White v. Ins. Co., 93 Mo. 282; Price v. Railroad, 77 Mo. 508; Mining Co. v. Casualty Co., 161 Mo. App. 208; Wallack v. Transit Co., 123 Mo. App. 167. The charge of negligence is not refuted by evidence that the best of surgeons are sometimes negligent. Samuels v. Willis, 133 Ky. 459. (4) Instructions cannot be broader than the facts proven, nor should they submit matters not supported by evidence. Degonia v. Railroad, 224 Mo. 564; Crow v. Railroad, 212 Mo. 611; Robertson v. Railroad, 152 Mo. 382; Waddingham v. Hulett, 92 Mo. 528; Vanhooser v. Berghoff, 90 Mo. 487; Mansur v. Botts, 80 Mo. 658; Price v. Railroad, 77 Mo. 508; Bank v. Murdock, 62 Mo. 70; Ludwig v. Cooperage Co., 156 Mo. App. 128; Crumley v. Timber Co., 144 Mo. App. 528; Marr v. Bunker, 92 Mo. App. 651; Day v. Railroad, 81 Mo. App. 471. (5) It is erroneous to give undue prominence to evidence by repetition of instructions. Cytron v. Transit Co., 205 Mo. 692; State v. McKinzie, 102 Mo. 620. (6) The petition does not count upon a contract. It sounds in tort. The contract was pleaded merely as an inducement. Hales v. Raines, 162 Mo. App. 46; Canady v.

Digitized by Google

Railroad, 134 Mo. App. 282; Carpenter v. Walker (Ala.), 1912, D. Am. and Eng. Ann. cases, 863. (7) The petition does not charge defendant with negligence (other than described in the first count) in the actual operation, but charges negligence in the treatment. That negligence consisted in allowing the wound to heal with the tube in it. This was not exercising ordinary care. Hales v. Raines, 162 Mo. App. 46; Ruth v. McPherson, 150 Mo. App. 694; Ruth v. Johnson, 172 Fed. 191; Reynolds v. Smith, 127 N. W. (Iowa) 192; Davis v. Kerr, 86 Atl. (Pa.) 1007; Brown v. Bennett, 156 Mich. 654; Samuels v. Willis, 133 Ky. 459; Grainger v. Still, 187 Mo. 197; West v. Martin, 31 Mo. 379; Beck v. Klink, 78 Iowa, 696; Carpenter v. Blake, 60 Barb. 488; Gerken v. Plimpton, 70 N. Y. S. 793. (8) (a) Plaintiff was entitled to recover for the loss of services, society and companionship of his wife, although there was no definite proof of their value. Furnish v. Railroad, 102 Mo. 669; Bruce v. Railroad, 158 S. W. 102; Jennings v. Appleman, 159 Mo. App. 12; Cullar v. Railroad, 84 Mo. App. 347. (b) If the defendant desired the damages restricted and to submit the condition of the health of Mrs. Reeves to the jury it was insumbent upon him to do so by offering an instruction on this issue. Waddell v. Railroad, 213 Mo. 8; Longan v. Weltmer, 180 Mo. 335; Browning v. Railroad, 124 Mo. 55; Hales v. Raines, 146 Mo. App. 243; Lathrop v. Railroad, 135 Mo. App. 16; Thompson v. Independence, 131 Mo. App. 375; Mabrey v. Road Co., 92 Mo. App. 610. (c) However, the second operation, which was after the suit was filed, kept her from her duties but ten days and she was thereafter able to perform her duties. All this was brought out by defendant. (9) The verdict is not excessive. This court will interfere on this ground only in extreme cases. Furnish v. Railroad, 102 Mo. 669; Bruce v. Railroad, 158 S. W. 102; Cullar v. Railroad, 84 Mo. App. 347; Perrett v. Kansas City, 162 Mo. 253; Williams v. Railroad, 123 Mo. 586. (10)

Digitized by Google

(a) It was not error to permit plaintiff to testify as to the amount paid Dr. Lutz to perform the operation. This was a part of the contract, the inducement. Authorities under point 6. (b) Besides, the only objection defendant made to this testimony was that it was immaterial. This is no objection at all. Latimer v. Railroad, 126 Mo. App. 70. (11) (a) It was not error to permit plaintiff to testify as to the pain and suffering of his wife. The fact that she suffered tended to show that she could not perform her household duties, and the loss of society and companionship. Cullar v. Railroad, 84 Mo. App. 347-350. (b) Besides, no objection was made to the testimony itself. The only objection made was that a layman is not competent to testify as to pain and suffering; that it would be competent only for a physician to so testify. Partello v. Railroad, 217 Mo. 645. (c) If the defendant desired the court to limit the scope of this evidence by an instruction to the effect that plaintiff could not recover for the pain and suffering of his wife, it was his duty to offer such instruction. Civil courts are not bound to give instruction unless asked. Brown v. Globe Ptg. Co., 213 Mo. 611.

NORTONI, J.—These are cross-appeals. The suit is for damages accrued to plaintiff on account of the loss of service of his wife through the negligence of defendant while performing and in treating a surgical operation upon her. The petition proceeds in two counts. On the first count the finding and judgment were for defendant, while plaintiff prevailed on the second. Plaintiff prosecutes an appeal from the judgment against him on the first count, and defendant prosecutes an appeal from the judgment against him on the second count.

Defendant is a practicing physician and surgeon in St. Louis, and was employed as such to remove a cancer from the breast of plaintiff's wife. It appears that,

Digitized by Google

for the purpose of the operation, plaintiff brought his wife from Jefferson City to St. Louis, and placed her in the Josephine Hospital, under the care of defendant, December 13, 1910. The operation was performed there on that date, and Mrs. Reeves, the patient, was discharged by defendant about January 13, 1911. It appears that, in performing such an operation, it is the usual practice to place hot water bags about the patient, with a view of sustaining the circulation during the ordeal and thereafter. Then, too, after the operation is performed, it is a proper practice, where the wound is of considerable area, to place drainage tubes therein, for the purpose of emitting such secretions as accumulate and might otherwise retard or impede the healing process. At the time plaintiff's wife was placed upon the operating table and while the anaesthetic was being administered, defendant personally placed a hot water bag against her limb, immediately above the ankle, and permitted it to remain there during the operation which ensued. The operation, which was an extensive one, in that the entire right breast of the patient, together with the glands under the arm, were removed, consumed about two hours. It appears that this hot water bag so placed inhered with unusual heat, for it made a deep burn on the patient's leg about three inches in breadth and five or six inches in length. The burn was not discovered, however, by defendant until the following day, when his attention was directed to it by an assistant. Thereupon defendant immediately set about treating it, but it seems to have continued in a painful and threatening condition for several weeks after plaintiff's wife returned to her home in Jefferson City on January 14th.

Plaintiff's wife withstood the operation well enough, and no complaint is made with respect to the manner of its performance, save that pertaining to the placing of the hot water bag against her limb so as to inflict the burn above mentioned. However, complaint

Digitized by Google

is made with respect to the treatment of the wound resulting from the removal of the cancerous breast, in that it is said defendant carelessly omitted to remove one of the drainage tubes therefrom, and permitted the wound to heal over while such tube continued therein. There is evidence tending to prove that, on January 14, when plaintiff's wife returned home to Jefferson City, the wound in the anterior portion of the breast was healed entirely, though it transpired afterwards that a drainage tube was concealed therein, for it festered and created an abscess. After returning to her home, Mrs. Reeves suffered considerably from the effects of the burn on her limb, and on January 19 plaintiff called in Dr. F. B. Hiller to treat that injury. Dr. Hiller treated the burn for several weeks and in the interim the patient began to suffer as well from the effects of the concealed drainage tube in the wound in her breast. On March 26, Dr. Hiller discovered a slight speck on the breast about the size of a split pea, it is said.

Though Dr. Hiller was called to treat the burn on the limb on January 19, it does not appear just when his attention was called to the trouble resulting from the concealed drainage tube in the wound in the breast. It appears that Dr. Hiller was the secretary of the State Board of Health, and, therefore, not in the active practice at Jefferson City. Because of this, he says he kept no books containing dates or records of his treatment. However, concerning the condition of the wound on the breast of plaintiff's wife, the doctor testifies as follows: "At the time I saw her, the wound in her right breast as a result of the operation had healed, with the exception of the point of drainage in the rear under the arm and back of the arm and a point of apparent infection, or a sore spot to be plain, showed in the anterior incision. There was nothing protruding from the breast. There was nothing protruding from the posterior drainage. It had practically healed.

Digitized by Google

There was oozing of some serum and consequent crusting. I continued to treat Mrs. Reeves' breast and leg at intervals up until the 26th of March and a little later. I have forgotten the exact dates. I kept no record of it. On the 26th of March I discovered a drainage tube in Mrs. Reeves' breast; it was just showing at the wound, just visible, which I removed. I will say that prior to this visit on the 26th of March, I had not seen her for probably ten days, a week or ten days, I removed what we call a cigarette drain from her breast. . . . ."

Here the doctor identified the drainage tube so removed, which was introduced in evidence, and continued, saying: "This point, on the anterior or in front, simply showed as a little suppurating point apparently of infection, probably the size of a split pea." Other evidence goes to the effect that Mrs. Reeves suffered great pain from both the burn and the concealed drainage tube in her breast until the tube was finally removed and for some days thereafter. Mr. Reeves, in speaking of the condition of his wife's breast, immediately before the extraction of the drainage tube and thereafter, says: "This formation finally opened on the breast. It became an abscess—that is, an opening or a hole." It should be said here, however, that another drainage tube had been inserted in the wound, designed to drain the posterior portion thereof under the arm, and this was removed in due time. No complaint is made in the case touching this matter, but it is mentioned in the evidence as revealing a small spot under the arm not yet healed when the patient returned home on January 14th and, indeed, for some time thereafter. This matter is referred to here merely for the purpose of obviating confusion and to the end of elucidating the particular drainage tube complained of, that is, the one inserted by defendant in the anterior portion of the breast.

Digitized by Google

Because of the severe burn on the limb and the concealed drainage tube, it appears plaintiff's wife suffered great pain and agony and was wholly unable to perform the usual service of a housewife until about the time when this suit was filed, on April 24, 1911.

As before stated, the petition is in two counts. The first declares upon and seeks a recovery for the loss of services, companionship and society of plaintiff's wife as a result of the burn inflicted upon her limb through the alleged negligence of defendant in placing an unusually hot water bag against it and thus inflicting the burn. The second count declares upon and seeks a recovery for the loss of services, companionship and society of plaintiff's wife, occasioned through the alleged negligence of defendant in the treatment of the surgical wound, through omitting to remove therefrom the drainage tube in the anterior portion of the breast and permitting the wound to heal over the same. As we interpret the case, it would seem that a recovery is sought in the first count for the loss of service, companionship and society which ensued from the burn for some weeks after plaintiff's wife returned home on January 14th, and until the burn healed, about the middle of February; and a recovery is sought in the second count as for the loss of services, companionship and society of the wife which ensued during the latter half of February and the month of March, and until the suit was filed April 24th, from the concealed drainage tube in the breast. Though the point is not pressed, it is clear enough that, in this view, the two counts do not declare upon and seek a recovery for the identical or the same cause of action.

We will first consider the plaintiff's appeal and thereafter that of the defendant. Plaintiff's appeal relates alone to the finding and judgment against him on the first count of the petition.

There can be no doubt that the evidence revealed a case for the consideration of the jury on the first count

Digitized by Google

of the petition, for though all of the expert witnesses say it was proper practice to use a hot water bag at the time defendant employed the one involved here, they say, too, it was not proper practice to use one so hot as to inflict a considerable burn on the patient. There is evidence, it is true, and this from eminent physicians and surgeons, that such burns frequently occur while an operation is being performed; but it would seem that an adherence to the precepts of ordinary care in the circumstances of the case should obviate them. Though it be that the surgeon is not required to exercise extraordinary or unusual care in the performance of his task, the fact of his holding out to perform the duties of the office he pursues annexes the obligation to his calling to exercise the care, skill and diligence that are ordinarily possessed by the average members of his profession in good standing in similar localities—regard being also had to the state of medical and surgical science at the time. [See Grainger v. Still, 187 Mo. 197, 85 S. W. 1114; Hales v. Raines, 162 Mo. App. 46, 141 S. W. 917.] Defendant's obligation was, therefore, to exercise ordinary care for the protection of Mrs. Reeves from burns likely to occur as a result of the application of hot water bags while the operation was being performed. If, as defendant and the expert witnesses say, burns are frequently inflicted in such manner, then the precepts of ordinary care required defendant to anticipate as much as within the range of reasonable probability in the circumstances of the case. The evidence is, that the hot water bag was wrapped with a towel and the patient's limb covered with a flannel operating garment. But be this as it may, the fact remains that a considerable and severe burn ensued from the application of the hot water bag. It would seem that ordinary inspection of the heated condition of the water and bag would reveal the probabilities of a burn, notwithstanding the towel and the flannel garment mentioned. Moreover, the application

Digitized by Google

of the hot water bag to the limb continued for as much as two hours, and during the time some inspection should have been made to ascertain whether an injury was thus being inflicted. The mere fact that all of the eminent medical men who testified say burns frequently occur from the use of hot water bags in such circumstances is not sufficient to conclude the matter as one of law, for it would seem that ordinary care could prevent such a result. Indeed, the same witness said, too, that it was not proper practice to inflict a burn upon the patient during the operation, from the application of the hot water bag. But be this as it may, the mere fact that all men are careless at some times does not relieve another from performing his duties with due care in the circumstances of the case. Obviously the evidence reveals a case for the jury on the first count of the petition. [See Samuels v. Willis, 133 Ky. 459.]

The court treated the case as one for the jury, and in submitting it instructed as follows, on behalf of defendant and at his request:

"1. The court instructs the jurors (on the first count in the petition) that the employment of defendant, Dr. Lutz, to perform the surgical operation (mentioned in the evidence) on plaintiff's wife was not for the exercise of extraordinary skill and care by defendant in the matter of said operation; defendant was only required to exercise reasonable skill and care, that is, such skill and care which an ordinary skillful and careful surgeon is accustomed to exercise and use in like surgical operations, under like circumstances; and, *if defendant exercised and used such skill and care in said operation* performed on plaintiff's wife, then the plaintiff cannot recover on the first count of his petition, although during the performance of said operation the hot water bag mentioned in the evidence *came in contact* with her person and caused the injuries out of which this suit grows.

"2. The court further instructs the jurors on the first count of the petition that the fact that defendant,

Digitized by Google

Dr. Lutz, may have been guilty of *inadvertence,* in connection with the use of the hot water bag whereby plaintiff's wife suffered the injuries mentioned in the evidence, will not justify a verdict for plaintiff unless such *inadvertence* amounted to failure on defendant's part to exercise in the use of said hot water bags, the skill and care of an ordinarily skillful and careful surgeon, taking into consideration the character of the operation and all the attending circumstances.

"3. The court instructs the jurors that if the injuries to the wife of the plaintiff mentioned in the first count of plaintiff's petition was the result of *an accident and not of defendant's negligence,* as that term is defined in other instructions given to you in this case, then the plaintiff is not entitled to recover on the first count of his petition, and your verdict on said count will be for the defendant.

"4. The fact that defendant, Dr. Lutz, may have been guilty *of inadvertence,* in connection with the use of the hot water bag whereby plaintiff's wife suffered the injuries mentioned in the evidence, will not justify a verdict for plaintiff, unless such inadvertence amounted to failure on defendant's part to exercise the skill and care of an ordinarily skillful and careful surgeon, taking into consideration the character of the operation and all the attending circumstances."

We regard each and all of these instructions as erroneous in the circumstances of the case, in that they are misleading. In the first instruction we have italicized the misleading features. We italicize, too, misleading words in the others. By the concluding portion of the first instruction the jury are told "if defendant exercised and used such skill and care in said operation performed on plaintiff's wife, then the plaintiff cannot recover on the first count of his petition, although, during the performance of said operation, the hot water bag mentioned in the evidence came in contract with her person and caused the injuries out of

Digitized by Google

which this suit grows." This portion of the instruction seems to contemplate that the operation is separate and apart from the use of the hot water bag. No doubt this is true as to the operation proper. However, it was in connection with and as an incident to the operation that the hot water bag was employed by defendant. It is clear that the obligation to exercise ordinary care obtained as well concerning the use of the hot water bag as it did in respect of the operation itself. The instruction seems to imply that if defendant used proper care in performing the operation properly, then the full measure of his obligation was acquitted, and this, too, although the hot water bag came in contact with the person of plaintiff's wife and burned her. In this the instruction is misleading, for it was not enough to exercise the requisite skill and care in performing the operation but it was essential as well for defendant to exercise the usual skill and care in looking out for and preventing the burn.

Moreover, the instruction minimizes the matter of defendant's placing the hot water bag by telling the jury that if they found it "came in contact" with the person of plaintiff's wife, etc. There is evidence in the case that sometimes patients struggled while undergoing an operation and in this manner portions of the body come in contact with a hot water bag so as to lie upon it and receive a burn. But there is not a word of evidence in the record here to the effect that plaintiff's wife struggled or came in contact with the bottle in this wise. On the contrary, both the attending nurse and defendant himself testified in plain terms that defendant personally took the hot water bag in his hands and placed it against Mrs. Reeves' limb while the anaesthetic was being administered. This being not only the undisputed evidence, but the admission of defendant as well, it appears that the reference in the instruction to the hot water bag, as if it merely came in contact with plaintiff's wife's limb, is misleading.

Digitized by Google

Both the second and third instructions above copied employ the word "inadvertence" as though such would excuse defendant for the consequences of the injury received through the burn. The jury are told substantially that though defendant may have been guilty of *inadvertence* in connection with the use of the hot water bag such will not justify a verdict for plaintiff unless his inadvertence amounted to a failure to use ordinary skill and care in the use of the hot water bag. The word "inadvertence" is defined by Webster to signify inattention and negligence. This being true, the two instructions under consideration inform the jury that, though defendant was negligent in the use of the hot water bag, no recovery should be allowed, unless such negligence amounted to a failure on his part to exercise the skill and care of an ordinarily skillful and careful surgeon, taking into consideration the character of the operation and all the attending circumstances. Though it be that the latter is the proper measure of care required, it is certainly true that degrees of negligence are not recognized in the jurisprudence of this State. Therefore, we regard these instructions as misleading, for the reason that they seem to direct the jury that, though defendant was negligent, something more than the negligent breach of duty recognized in our law was essential in order to affix liability for the burn.

Defendant's third instruction told the jury that if plaintiff's wife's injury from the burn was the result of an accident and not of defendant's negligence, plaintiff is not entitled to recover. There is no evidence in the case justifying the theory of accident and this instruction, too, was misleading on the issues made. The evidence is plain, positive and direct, both from the nurse, who testified at the instance of plaintiff, and of defendant, who testified for himself, that defendant took the hot water bottle into his own hands and personally placed it against the limb of Mrs. Reeves, where

Digitized by Google

it was permitted to remain and accomplish the burn. There is no suggestion that defendant placed the hot water bag in some particular place or position and that it was accidentally moved against the patient's limb or that she accidentally placed her limb upon it. It is true, as before said, that there is evidence that patients sometimes do accidentally come in contact with a hot water bag while kicking during the administration of an anaesthetic. But no one suggests that the patient moved about in the instant case, and defendant admits that he placed the hot water bag against the limb where the burn was effected. Defendant says, "To the best of my recollection, the nurses placed the hot water bag at the bottom of her feet, which I removed, . . . I moved it up between her limbs—that is to say, between the ankle and the knee joint." It is clear enough that there was no place in the case for an instruction on the theory of accident, which is said by Webster to be the happening of an unforeseen event, for defendant, in the eye of the law, is required to foresee such results as might be anticipated within the range of reasonable probability through exercising ordinary care to that end. All of the instructions above copied seem to be drafted with a view of directing the attention of the jury away from the fact that defendant, himself, placed the hot water bag at the place where it inflicted the burn, and to minimize the result as attributable to mere accident. They are highly misleading, and it is obvious they were prejudicial to plaintiff's rights on the true issue arising on the first count of the petition. A new trial should be awarded on this count of the petition for the reason above stated.

We come now to consider defendant's appeal from the judgment against him on the second count of the petition. It is urged the court should have directed a verdict for defendant on this count because the evidence is uniform that it was proper practice to insert a drainage tube in the wound and permit it to remain

Digitized by Google

there until the healing was complete. It is true the record abounds with expert testimony to the effect that it was proper to insert the drainage tube, but no witness testifies that it was proper to permit the wound to heal over such tube, and it is certain that none would undertake to do so. Defendant says that he inserted the particular drainage tube involved here in the wound on January 13—that is, on the day of the last treatment of the wound by him. In this he is corroborated by his assistant and a nurse, and all of them say that the tube protruded slightly from the wound at that time. But though such be true, the evidence for plaintiff is contradictory, in that it goes to show the wound was actually healed with the drainage tube concealed therein, when the patient returned to her home in Jefferson City on the following day. As before said, the drainage tube involved here was that inserted in the wound in the right breast and the averment of negligence touching the matter is, that defendant "carelessly and unskillfully permitted said wound to completely heal up and over said drainage tube and gauze, and negligently, carelessly and unskillfully permitted the same to remain within the body of the plaintiff's said wife." No one can doubt that such was negligence on the part of defendant, if established to the satisfaction of the jury, and it appears to have been thus established. [Ruth v. Johnson, 172 Fed. 191.]

The evidence for plaintiff touching this matter is as follows: "When Mrs. Reeves returned home on the 14th of January, the whole line of incision on her right breast was entirely healed. There was a mere large dot and a little scab on a small incision that seemed to have been made below the right arm and a little back, and that scab I dressed for her that evening; just rubbed the scab off. It was closed, but it didn't seem to be entirely healed. That was under the arm. *On the breast it was entirely healed.*" (Italics are our own.) From this testimony it appears that, while the

Digitized by Google

point of drainage under the right arm, from whence the tube had been theretofore removed, was apparent, but not entirely healed, for a small scab covered it, the incision on the breast, from whence Dr. Hiller subsequently extracted the concealed drainage tube, was entirely healed over, and this, too, on the day following plaintiff's discharge by defendant. Though it be that defendant and his witnesses say the tube was inserted on January 13, and that such insertion was proper and that it extended slightly from the body, it appears clear enough from the testimony of plaintiff such could not be the fact, if the wound was healed over it on the following day. No one can doubt that the matter of the credibility of the witnesses and the weight and value of their testimony was a question for the jury, and it is certainly none the less so because the evidence preponderates in favor of defendant. If there is substantial evidence tending to support the theory advanced by plaintiff, it will suffice, and the question is concluded here by the finding of the jury thereon. [See Gannon v. Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907.]

The petition sets forth a contract whereby it is averred plaintiff employed defendant, who held himself out as possessing the requisite skill as a physician and surgeon, to perform the operation in removing the cancer and to treat plaintiff's wife until the surgical wound was healed. After having thus alleged the contract of employment, by way of inducement, it proceeds as in tort as for the negligent performance of the duty annexed by law to the calling of a physician and surgeon. Plaintiff testified that he paid defendant $250 in compensation for the operation and treatment while his wife was yet in the hospital. The testimony of plaintiff to the effect that he paid defendant $250 as his fee was objected to, but the court admitted it over defendant's exception. It is urged this was error,

Digitized by Google

for it is said that it no doubt enhanced the recovery to that amount and was therefore prejudicial. While it may be that it is competent to recover from the surgeon the amount paid him in compensation for an operation negligently and carelessly performed, it must be conceded that such is not to be allowed here, for no prayer to that effect is contained in the petition. This suit proceeds alone on the part of the husband for the loss of the services, companionship and society of the wife, and, of course, he is therefore to be compensated only on that score. But be this as it may, the only objection interposed to the testimony that plaintiff had paid $250 to defendant in compensation of his charge is that such evidence was immaterial. The rule of practice is well established in this State that a mere general objection to the reception of evidence is unavailing to entitle the objecting party to a review of the error assigned thereon in the appellate court, if such evidence so objected to was competent for any purpose in the case. [See Bragg v. Met. St. Ry. Co., 192 Mo. 331, 91 S. W. 527.] This is especially true where the objection amounts to no more than that the evidence is immaterial, as here. [See Latimer v. Met. St. R. Co., 126 Mo. App. 70, 78, 103 S. W. 1102.] Though it be the evidence here objected to might properly have been excluded on other grounds, it was certainly competent under the allegations of the petition, which, by way of inducement, set forth the contract of employment of defendant and under which the operation was performed and treatment rendered. It is entirely proper to set forth the contract of employment as matter of inducement in a malpractice case, as we have heretofore declared. [See Hales v. Raines, 162 Mo. App. 46, 141 S. W. 917.] Defendant did not admit, but rather denied, through the office of the general denial in his answer, the employment set forth in the petition, and it was therefore certainly competent for plaintiff

Digitized by Google

to prove it, and to prove, too, that he had fully performed all of the conditions on his part.

It is urged that the court erred in permitting plaintiff to detail the pain and suffering of his wife incident to the concealed drainage tube in her breast and subsequently for a time to its removal by Dr. Hiller on March 26. The argument is that, as plaintiff is not entitled to recover for such pain and suffering of his wife, the evidence should not be received. But we are not persuaded to this view. It is true plaintiff was not entitled to recover in this action for the pain and suffering his wife endured, but he was entitled to the services of his wife, of which such pain and suffering deprived him, and he was entitled, too, to the companionship and society of his wife free of such pain and suffering as defendant's negligent act entailed upon her. It would be difficult to establish his case of loss of services, companionship and society of the wife without giving evidence of the pain and suffering endured by her, which, as a result of defendant's fault, tended to deprive him of his marital rights in the premises. [For an authority in point, see Cullar v. M. K. & T. R. Co., 84 Mo. App. 347.]

There is no evidence tending to prove the value of the services of plaintiff's wife to him. And because of this it is urged the court erred in submitting that matter to the jury. However, there is an abundance of evidence that plaintiff's wife was disabled from performing the duties of a housewife and that he employed another to keep house for him. Obviously this is sufficient. It may be, in cases where the wife is conducting a business on her own account, and she suffers an injury through the negligence of another, which impairs and diminishes her earning capacity, that, in her suit on that account, evidence must be given of the value of the loss of services or earnings. Such is the rule which obtains generally in suits for damages when it is sought by plaintiff to recover for loss of his own

Digitized by Google

services and seek something substantial—that is, more than nominal damages—on account of diminished earning power and loss of time. [See Wallack v. St. Louis Transit Co., 123 Mo. App. 160, 100 S. W. 496.] Moreover, it is said, too, that the husband is not entitled to recover for the loss of services of his wife, such as her separate earnings, which are assured to her under the married woman's statute, when it appears she is conducting a separate business on her own account. In cases of that character, it is said the husband's measure of recovery for loss of the services of the wife pertains alone to her services as his wife. [See Nelson v. Met. St. Ry. Co., 113 Mo. App. 659, 88 S. W. 781.]

But be all of this as it may, the instant suit proceeds as for a violation of the ancient common law right of *consortium*. The husband's right of *consortium* at common law included the right of the services of the wife to be rendered to the husband, together with the right of her society and the comfort incident to the association and her companionship. Such are the rights which, it is asserted here, defendant has invaded and of which plaintiff has been deprived by his wrongful act. [See Stout v. Kansas City Terminal R. Co., 172 Mo. App. 113, 157 S. W. 1019; Marri v. Railroad, 84 Conn. 9, 78 Atl. 582, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B 1120.] In such cases, it would be difficult, indeed, to ascertain in dollars and cents the value of the *consortium* of either spouse to the other. The relation and the right are rather of a sacred character than of a valuable monetary interest or right. In this view, our Supreme Court has determined that it is not essential to introduce evidence tending to prove the value of the society and companionship of the wife. Obviously the principle supporting this view goes to the effect that the law never requires pecuniary proof with reference to a nonpecuniary loss. Such is the thought of an eminent author on the subject. [See Watson on Damages, p.

Digitized by Google

403.] Therefore, in a suit by the husband for the loss of the wife's companionship and society as a result of personal injuries sustained by her through the negligence of another, there need be no direct proof of the value of such society, comfort and companionship. The very nature of the subject does not admit of such proof. This being true, the assessment of reasonable compensation therefor must, it is said, necessarily be committed to the sound discretion and judgment of the triers of the fact. [See Furnish v. Mo. Pac. R. Co., 102 Mo. 669, 15 S. W. 315; Waston on Damages, pp. 403, 404; 4 Sutherland on Damages (3d Ed.), sec. 1252.]

As the right to the society, comfort and companionship of the wife is but parcel of the common law right of *consortium,* it would seem the same rule should apply to the loss of her services as well, for, indeed, after all, the right to the society and companionship is included within that of the husband to the wife's unimpaired services. It is certain that the husband is entitled to recover for the loss of the services of his wife of which he is deprived by the negligent act of another, even though the parties are in such circumstances that she is not accustomed or desired to do physical labor; or the husband may not have realized anything from her services before she was injured. [See 4 Sutherland on Damages (3 Ed.), sec. 1252.] Therefore, the courts declare, in the cases of the character of this one, that there need be no direct or express evidence of the value of the wife's services, either by the day, week, month or of any other period of time, or of any aggregate sum touching the matter, for it is sufficient to show her disability from performing service if it were desired or she chose to do so. It is said when the loss of a wife's services resulting from a personal injury is to be compensated for to her husband, she is not to be treated as an ordinary servant or as a mere hireling. On the contrary, she is to be regarded as sustaining to her husband and his household a relation special and peculiar in

Digitized by Google

itself, for the deprivation of which, even for a short time, compensation for services may not be accurately ascertained and given in evidence, in dollars and cents. Therefore, the actual facts and circumstances of each case, together with the experience and judgment of the jurors, are to furnish the guide in determining the amount of the recovery, and this, too, without evidence of value. [See Met. St. Ry. Co. v. Johnson, 91 Ga. 466; Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414; 4 Sutherland on Damages (3d Ed.), sec. 1252, and cases in notes; Bruce v. United Rys. Co., 175 Mo. App. 568, 158 S. W. 102.]

Plaintiff's instruction on the measure of damages was well enough in its general scope and contained no elements amounting to misdirection. This being true, it must be regarded as sufficient, under the rule of Browning v. Wabash R. Co., 124 Mo. 55, 27 S. W. 644, for defendant asked no limiting instruction whatever. The rule that defendant may waive, through omitting to request a limiting instruction, the right to complain of an instruction on the measure of damages, which is sufficient in its general scope and contains no elements of misdirection, is constantly adhered to and has been but recently reaffirmed in both the Supreme Court and this court, as will appear by reference to King v. City of St. Louis, 250 Mo. 501, 157 S. W. 498; Nelson v. United Rys. Co., 176 Mo. App. 423, 158 S. W. 446. That the rule of the Browning case applies in malpractice cases as well as others is well settled by decisions of the Supreme Court in point. [See Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655; Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675.]

We do not consider the verdict of $1500 on the second count as excessive. All of the points raised have been duly considered and no reversible error appears, in so far as the recovery on the second count of the petition is concerned. However, the judgment must be reversed for the errors pointed out with respect to the

Digitized by Google

trial on the first count and the cause remanded for further proceedings thereon.

It is therefore ordered and adjudged that the judgment be reversed and the cause remanded for further proceedings on the first count and that the court hold the verdict in abeyance on the second count until the first one is finally disposed of and the final judgment in the case to be entered on both counts. The plaintiff should recover the costs of the appeal. It is so ordered and adjudged. Both *Reynolds, P. J.*, and *Allen, J.*, concur in all that is said in the opinion, save Judge REYNOLDS is of the view that while $1500 would not be an excessive recovery on both counts of the petition, he is doubtful of it being proper as the verdict is on the second count alone.

IROQUOIS MANUFACTURING COMPANY, Respondent, v. ANNAN-BURG MILLING COMPANY et al., Appellants.

St. Louis Court of Appeals. Submitted on Briefs November 3, 1913. Opinion Filed December 2, 1913.

1. **PLEADING: Caption: Surplusage.** The words "a corporation," appearing in the caption of a petition after the name of the plaintiff, may be disregarded as surplusage, where the body of the petition contains no averment that plaintiff is a corporation.

2. **———: ———: ———.** The caption of a petition is no part of the petition.

3. **PARTNERSHIP: Actions: Parties.** Actions by a partnership should be brought in the names of the individual partners, and if brought in the firm name, there is a defect of parties.

4. **CORPORATIONS: Questioning Corporate Existence: Pleading.** Sec. 1985, R. S. 1909, declaring that the fact of incorporation need not be proved unless put in issue by affidavit filed with the pleadings, does not make the affidavit part of the answer,

Digitized by Google

but, in order to raise the question as to the corporate existence of plaintiff, it is necessary that the answer contain a denial of such existence.

5. **PLEADING: Defect of Parties: How raised.** Where a defect of parties appears on the face of the petition, it must, under Sec. 1800, R. S. 1909, be taken advantage of by demurrer, but, if not so appearing, it must, under section 1804, be taken advantage of by answer, or the defect is waived.

6. **ESTOPPEL: Pleading.** Ordinarily, an estoppel, to be availed of, must be pleaded.

7. **———: Action on Appeal Bond: Estoppel to Question Corporate Capacity of Plaintiff.** Plaintiff, in the caption of the petition, was described as a corporation, but no averment concerning its corporate existence was set forth in the body of the petition. Defendant appealed from a judgment for plaintiff, and gave an appeal bond in favor of plaintiff. Defendant did not raise the question as to the corporate existence of plaintiff or its right to sue as a corporation; but, in an action on the appeal bond, after the judgment had been affirmed, the surety (who was the attorney for defendant) sought to defend on the ground that plaintiff was not a corporation but the name used by plaintiff was merely the trade name of a copartnership. *Held*, that, notwithstanding estoppel was not pleaded, the surety should, in furtherance of justice, he held to be estopped to set up such defense.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

George F. Beck for appellants.

(1) The affidavit filed with defendants' answer properly put in issue plaintiff's corporate existence. R. S. 1909, sec. 1985; White v. I. O. O. F., 30 Mo. App. 682; Meyer Bros. v. Insurance Co., 73 Mo. App. 166. (2) The rule denying the right to question, in a collateral proceeding, a corporation's existence applies only where the corporation had a *de facto* existence. White v. I. O. O. F., 30 Mo. App. 682; Board of Trade v. Building Co., 136 Ill. App. 606; Krutz v. Town Co., 20 Kan. 397; Jones v. Hardware Co., 21 Col. 263; Mar-

Digitized by Google

tin v. Deetz, 102 Cal. 55. (3) The reason of the rule is that it would be against public policy to allow the parties to deny the existence of a *de facto* corporation. 2 Cook on Private Corporations (5 Ed.), sec. 637, p. 1422; 2 Morawetz on Private Corporations, sec. 750; Clark & Marshall on Private Corporations, sec. 243. (4) The Iroquois Manufacturing Company cannot maintain the suit as a corporation *de facto*, because all the essentials of a *de facto* corporate existence are lacking. It is a partnership. 10 Cyc. 247; 2 Morawetz on Private Corporations, sec. 777; Mechem on Private Corporations, secs. 285 and 260; Clark & Marshall on Private Corporations, pp. 241 and 260. (5) The partnership cannot maintain the suit as a corporation on the theory of estoppel because the partners never claimed to be a corporation *de facto*. Board of Trade v. Imperial Building Co., 136 Ill. App. 606; Krutz v. Town Co., 20 Kan. 397; Jones v. Hardware Co., 21 Col. 263; Martin v. Deetz, 102 Cal. 55. (6) Defendants never recognized plaintiff as a corporation. The name Iroquois Manufacturing Company does not imply incorporation. Clark v. Insurance Co., 7 Mo. App. 77; White v. I. O. O. F., 30 Mo. App. 682; 2 Cook on Private Corporations, secs. 637 and 243. (7) Plaintiff waived any question of estoppel by failing to specifically plead it. Railroad v. Ry. & Navigation Co., 22 Fed. 245; Whiteside v. Magruder, 75 Mo. App. 364; Hammerslough v. Cheatham, 84 Mo. 13; Bray v. Blount, 77 Mo. 235.

Russell I. Tolson for respondent.

REYNOLDS, P. J.—This is an action on a bond given by appellants to respondent on an appeal from a judgment of the circuit court to this court, in a cause in which the respondent here was plaintiff and the Annan-Burg Milling Company defendant, the Annan-Burg Milling Company executing it as principal, and

Digitized by Google

Henry Burg and George F. Beck as sureties, one the attorney, the other a member of the defendant corporation. It is for the sum of $200, and after reciting that the Annan-Burg Milling Company has appealed from the judgment rendered against it and in favor of the Iroquois Manufacturing Company in the circuit court, city of St. Louis, for the sum of $53.80, together with costs, it contains the usual conditions that appellant should prosecute its appeal with diligence to a decision in the appellate court, etc. Averring that the condition has been broken in that the principal had not prosecuted the appeal, but that the appeal had been dismissed and the judgment of the circuit court affirmed, and that execution had issued on the judgment of this court, and had been returned unsatisfied, judgment is asked for the penalty of the bond and damages in $109.83, and interest and costs.

An answer was filed to this on the 21st of April, 1911, which consists of a general denial, not under oath. On the 21st of May, 1911, George F. Beck filed an affidavit that at the time of the commencement of the action, there was not, nor is there now, any such corporation as the Iroquois Manufacturing Company named as plaintiff herein. The case was tried by the court, a jury being waived, and evidence introduced on the part of plaintiff which included the bond, the judgment of the circuit court in the case of Iroquois Manufacturing Company v. Annan-Burg Milling Company, the judgment of affirmance by our court, its mandate of affirmance, as also the execution issued out of the circuit court against the Annan-Burg Milling Company in that cause and the *nulla bona* return of the sheriff on the execution. Defendants demurred to the evidence. That was overruled. Whereupon defendants introduced in evidence, over the objection of respondent, a deposition which tended to prove that the Iroquois Manufacturing Company was a partnership of three individuals, carrying on business under that name and

Digitized by Google

was not a corporation. At the conclusion of the testimony the court, refusing a declaration asked by the appellants here, which was in the nature of a demurrer to the evidence, rendered judgment against defendants for the penalty of the bond and awarded execution for the debt, interest and costs. From that defendants have duly prosecuted their appeal to this court.

The affidavit interposed was undoubtedly considered by the trial court as ineffective for the purpose of raising an issue. While in the caption of the petition, after the name of the plaintiff, the words, "a corporation," appear, these are mere words of surplusage, disregarded even in a criminal cause. [State v. Murphy, 49 Mo. App. 270.] It has often been decided that the caption or style is no part of the petition. [Pattison, Code Plead. (2 Ed.), secs. 264-270.] In the petition itself there is no averment that plaintiff is a corporation. If a partnership and the members not made plaintiffs, there is a defect of parties. Appellants attempted to raise the issue of corporation by affidavit filed long after the filing of a general denial. It is true that section 1985, Revised Statutes 1909, provides that where the parties to the action sue or are sued as a corporation, it shall not be necessary to prove the fact of such incorporation unless the opposite party put such fact in issue by affidavit filed with the pleadings in the cause. But this does not make the affidavit a part of the answer. It is in aid of the answer but not of the answer. This section is to be construed in connection with other provisions of the statute. Conceding that we have here a defect of parties, that is, it appearing by evidence in the case and outside the pleadings that "Iroquois Manufacturing Company" is the trade name of a partnership, undoubtedly the members of the firm should have been named as parties plaintiff, suing under their firm name. That was not done. A defect of parties, the defect appearing on the face of the petition, must be taken advan-

Digitized by Google

tage of by demurrer (secton 1800, R. S. 1909); not so appearing, then by answer; failing that the defect is waived (section 1804, Revised Statutes 1909).

While there was evidence by way of deposition that plaintiff's name was that of a partnership and not that of a corporation, the learned trial judge properly disregarded it, for the sufficient reason, as above given, that there was no issue as to defect of parties raised by the answer. So the Kansas City Court of Appeals held in Farmers' Bank of Dearborn v. Fudge, 109 Mo. App. 186, 82 S. W. 1112, a case that on this point nearly parallels that at bar.

Over and above this, there is no merit in this contention first here made, that plaintiff in this case is not a corporation but a partnership. While it is true that the respondent did not plead estoppel, as it might have done, and as is generally necessary to make estoppel available, the defense attempted to be here made is so glaringly unfair when now interposed that we would not hesitate here to apply that doctrine in furtherance of justice. Respondent sued in the name of Iroquois Manufacturing Company in the original cause; under that title the case went to trial and judgment before the justice and in the circuit court. No issue as to corporation seems to have been there raised. The Annan-Burg Milling Company appealed from that judgment to our court and executed a bond with its own attorney as surety, in favor of respondent in the name, "Iroquois Manufacturing Company." The appeal was abandoned and execution duly issued and returned *nulla bona*. Called upon to respond on the bond voluntarily given to respondent in its trade name, appellants first attempt to raise the issue of corporate existence.

We considered a question somewhat germane to this in Scientific American Club v. Horchitz et al., 168 Mo. App. 35, 151 S. W. 475. While that case is not altogether applicable here, we repeat what is there

Digitized by Google

said (l. c. 39) when referring to the attack on an execution which was issued on a judgment rendered: "Whether the right of plaintiff to maintain the action was or was not there in issue or tried, it was an issue which could have been there tried, and 'the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'" The subquote embodied in the above is from 2 Taylor on Evidence (8 Ed.), p. 1454, sec. 1702.

Under both these views, legal and equitable, we hold that the defense undertaken to be here interposed is unavailable.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

JOHN H. SCHROEDER WINE AND LIQUOR COMPANY, Appellant, v. WILLIS COAL AND MINING COMPANY et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted November 3, 1913. Opinion Filed December 2, 1913.

1. **GARNISHMENT: Exemptions: Illinois Law: Conflict of Laws: Comity.** An employer who is garnished in this State, in an action against an employee living in Illinois and not personally served nor appearing in the action, may, under the doctrine of comity, set up as a defense the exemption provided for by Sec. 14, p. 1252, Hurds' Revised Statutes of Illinois, 1912, which provides that the wages of a wage-earner who is the head of a family, to the amount of $15.00 a week, shall be exempt from garnishment, and which requires every employer to pay such exempt wages to the employee when due, upon his making and delivering an affidavit that he is the head of a family, notwithstanding any garnishment proceedings.

Digitized by Google

2. ———: ———: ———: **Right of Garnishee to Set up Exemptions.** Sec. 14, p. 1252, Hurds' R. S. of Illinois, 1912, provides that the wages of a wage-earner who is the head of a family, to the amount of $15 a week, shall be exempt from garnishment, and requires every employer to pay such exempt wages to the employee when due, upon his making and delivering an affidavit that he is the head of a family, etc., notwithstanding any garnishment proceedings. *Held*, that an employer who is garnished in this State, in an action against an employee living in Illinois and not personally served nor appearing in the action, may set up as a defense the exemption provided for by that statute, where the employee makes and delivers the required affidavit to him.

3. **CONFLICT OF LAWS: Comity.** The courts of one State commonly recognize the laws of another State, where the general policy of the two States on the subject is the same.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Frank Landwehr for appellant.

(1) For the purposes of attachment a debt has a situs wherever the debtor can be found. Neither is it material that the debt was not made payable in the State where the attachment proceedings are instituted. Wyeth H. & M. Co. v. Lang, 54 Mo. App. 147; Wyeth H. & M. Co. v. Lang, 127 Mo. 242; Dinkins v. Crunden Martin W. Co., 99 Mo. App. 310; Howland v. Railroad, 134 Mo. 474; Shull v. Railroad, 221 Mo. 140; Reno on Non-Residents, sec. 148; Harvey v. Railroad, 50 Minn. 405, 17 L. R. A. 84; Pennoyer v. Neff, 95 U. S. 714; Waples on Debtor and Creditor, page 302. (2) Exemptions are a personal privilege and cannot be pleaded except by a personal appearance of a party entitled to claim them. Neither are exemption laws a part of the contract; they are a part of the remedy and subject to the law of the forum. Howland v. Railroad, 134 Mo. 474; Railroad v. Sturn, 174 U. S. 710; Freeman on Executions, sec. 209; Railroad v. Barron, 83 Ill. 365; Broad-

Digitized by Google

street v. Clark, 65 Iowa, 670; Willard v. Sturn, 96 Iowa, 555; King v. Cross, 175 U. S. 399; Waples on Debtor and Creditor, page 302; Osburn v. Schutt, 67 Mo. 712. (3) When there is a seizure of defendant's property at the commencement of the action, or, in garnishment, what is equivalent to a seizure at the time, namely, a service of process upon the garnishee, accompanied by publication against the nonresident defendant, such process is due process of law and the judgment rendered will divest the defendant of his title to such property and will protect the garnishee from the danger of double payment. Reno on Nonresidents, sec. 241; Molyneux v. Seymour, 30 Ga. 440; 2 Black on Judgments, sec. 52; Shinn on Attachments, secs. 486 and 861; 1 Greenleaf on Evidence, sec. 543.

Dawson & Garvin and *Leonard Wilcox* for respondent.

(1) Courts of justice have continually acted upon "the comity of the nation," and in the silence of any positive rule affirming or denying or restraining the operation of foreign laws presume the tacit adoption of them by their own government unless they are repugnant to its policies or prejudicial to its interests. Hilton v. Guyot, 159 U. S. 113; Banchor v. Gregory, 9 Mo. App. 102; Stoeckman v. Railroad, 15 Mo. App. 509; Zuppan v. Bauer, 17 Mo. App. 682; 2 Wharton on Conflict of Laws (3 Ed.), p. 1590; Demmick v. Railroad, 103 U. S. 18. (2) The public policy of the State of Missouri with respect to reaching wages by process of garnishment is like or quite similar to the laws of Illinois on that subject. R. S. 1909, sec. 2415; Laws 1911, p. 141. (3) The wages of the head of a family residing with the same to the amount of $15.00 per week is exempt from garnishment by the laws of Illinois, and the surplus only, if any, is permitted to be held by the employer to abide the event of a garnishment proceeding. Hurd Rev. Stat. of Ill. 1905, p. 1119,

Digitized by Google

sec. 14; Becker v. Railroad, 158 Ill. App. 520, affirmed 250 Ill. 40. (4) Under the facts and circumstances of these cases the trial judge rightly exercised his discretion to act upon "the comity" and enforce the letter of the Illinois law and the spirit of the Missouri law, and thereby did complete justice to all parties. Todd v. Railroad, 33 Mo. App. 110; Fielder v. Jessup, 24 Mo. App. 91; Railroad v. Maltby, 34 Kan. 125; Railroad v. Barron, 83 Ill. 365; Wright v. Railroad, 19 Neb. 175; Bullard v. Chaffee, 61 Neb. 83; Railroad v. Dooley, 78 Ala. 524; Hilton v. Guyot, 159 U. S. 165. (5) The enforcement of foreign laws respecting exemption of wages by comity, approved by this court in the Todd and Jessup cases (33 Mo. App. 115; 24 Mo. App. 95, 96), has been expressly declared by the Legislature of Missouri as the policy of this State. Act of April 18, 1911, Laws 1911, p. 14. (6) The judgment below was within the power of the court, acting *ex comitate*. And in view of the action of the Legislature in passing the Act of April 18, 1911, a reversal of the judgment below ought not to be granted appellant, no lien or vested right having been established. Roenfeldt v. Railroad, 180 Mo. 564; Schuster v. Weiss, 114 Mo. 173; McGarry v. Coal Co., 93 Mo. 240; Railroad v. Mottley, 219 U. S. 468; Lovell v. Davis, 52 Mo. App. 345; R. S. 1909, sec. 1736. (7) Until there has been a valid judgment against the defendant there can be no final judgment against the garnishee; and the burden is on plaintiff to show such prior judgment. Hauptman v. Whittle, 85 Mo. App. 188-191; McCloon v. Beattie, 46 Mo. 391. And appellant's abstracts do not show such judgment, unless a mere recital that defendant "was brought in by publication" is sufficient. (8) Garnishment is a statutory proceeding. Where the statute says that a person or debt shall not be subject to garnishment, that person, or the garnishee summoned and owing such debt, can make the defense that the pro-

Digitized by Google

ceeding is not authorized by law, and Ashburn v. Schutt does not apply. Davis v. Meredith, 48 Mo. 263; Barnes v. W. W. & Co., 135 Mo. App. 491; Cooper v. Scyoc, 104 Mo. App. 432. (9) A proceeding by garnishment is not in the nature of a personal action against the garnishee; the garnishee cannot even by his voluntary appearance and answer confer any jurisdiction upon the court as to the debt in his hands unless proper steps have been taken to bring that debt into court, for the purpose of condemnation. That proposition in this State at least is fully settled. Haley v. Railroad, 80 Mo. 112; Fletcher v. Ware, 81 Mo. 524; Masterson v. Railroad, 20 Mo. App. 653.

REYNOLDS, P. J.—Appellant, plaintiff below, brought its action before a justice of the peace in the city of St. Louis against one Perrina and another, to recover a balance alleged to be due it on an account, the balance claimed being $127.33. A writ of attachment was sued out against the defendants and the Willis Coal & Mining Company summoned as garnishee, notice of attachment of any sum or sums due by it to defendants being duly served upon the garnishee. There was no personal service upon defendants, whatever service was had on them being by publication, nor did they appear or answer, but judgment went against them by default on due proof of publication of notice. The garnishee appeared and in March, 1910, answered before the justice, denying any indebtedness to one of the defendants but admitting that it owed Perrina $86.30; that Perrina was the head of a family and a resident of Illinois, working for the garnishee in that State, and that the amount due him by the garnishee is for wages earned in the State of Illinois during the month of March, 1910, payable in Illinois; that defendant served upon the garnishee in the State of Illinois, an affidavit purporting to be made by him, a

Digitized by Google

copy of which was attached, and had also made a demand in writing upon the garnishee, a copy of which was also attached to the answer. Judgment was rendered by the justice in favor of plaintiff against defendants for the debt, and against the garnishee for $85.30. In due time the garnishee prosecuted its appeal to the circuit court. In that court it filed an amended answer in which it was set out, in substance, that it is a corporation duly organized by virtue of the laws of the State of Missouri, and a citizen of this State; that it has also complied with the laws of the State of Illinois permitting foreign corporations to do business in that State; that on the dates hereinafter mentioned it owned and operated coal mines in the State of Illinois; that it did not owe one of the defendants named anything, either due or to become due, but that the other defendant, Perrina, was employed by it as a laborer and labored in its mines in the State of Illinois; that at the time of the service of the garnishment, it owed Perrina as wages for labor in the mines in Illinois, done during the month of March, 1910, the sum of $86.30, which sum was due and payable to Perrina in the State of Illinois; that the garnishee had duly notified both defendants of the fact that it had been summoned as garnishee in the proceedings begun before the justice before mentioned; that those defendants did not appear; that no service had been had upon them or either of them, otherwise than by publication, and no jurisdiction had been acquired by the justice over the person of either of the defendants; that the defendant Perrina had made and delivered to the garnishee his affidavit that he was the head of a family living in Illinois with him and dependent upon him for support and that he desired to avail himself of the provision of the law of Illinois which allowed him fifteen dollars a week as exempt from garnishment; and that Perrina had afterwards made de-

Digitized by Google

mand upon the garnishee for payment of the amount due him for his labor, under penalty of being sued in the State of Illinois by him (Perrina), to recover the amount of wages if payment was refused.

This answer further avers, on information and belief, that Perrina is the head of a family and a resident of the State of Illinois, and that the claim in suit by plaintiff was for the price of liquors sold by plaintiff to Perrina and his partner, the other defendant, in the State of Illinois. It further pleaded the law of the State of Illinois, to-wit, Act May 11, 1901, now section 14, p. 1252, "Hurd's Revised Statutes of Illinois, 1912," setting out that law; that the wages owing by the garnishee to Perrina at the time this garnishment was attempted to be made were the earnings for four weeks from March 1st to March 31st, 1910, and exceeded the amount exempted as aforesaid by $26.30. Averring that the garnishee has at all times been willing to pay to plaintiff and into court for it this excess but that plaintiff has refused to release the garnishee except upon payment of the full amount sued for, it is further averred that pursuant to Perrina's notice and demand above referred to, he had brought suit against the garnishee for his wages before a justice of the peace in the proper town in the State of Illinois and that the garnishee had been summoned therein and was without any defense under the law of Illinois except as to the $26.30, and being prevented by plaintiff here from paying Perrina's exemption given to him under the laws of Illinois, judgment for $86.30 was rendered against the garnishee and in favor of Perrina in his said suit, from which judgment the garnishee has appealed to the Illinois Circuit Court, where the case is now pending. The garnishee, therefore, the premises considered, avers that the justice of the peace before whom the present suit had been pending and the circuit court now, in natural justice and equity,

Digitized by Google

should, as a matter of comity, give effect to the Illinois exemption law and enjoin plaintiff from further prosecuting these proceedings and discharge the garnishee upon payment into court of the sum of $26.30, less a proper allowance by the court for attorney's charges.

Along with this amended answer, the garnishee filed a motion to dismiss the cause as to it. This motion was overruled. It is unnecessary to consider it here. The cause thereupon went to trial on the 5th of June, 1911, before the court, a jury having been waived. The evidence tended to establish the averments of the amended answer, it being conceded that respondent owed Perrina $86.30 for wages for labor done in March, 1910.

The law of Illinois above referred to was also put in evidence. Under a finding that the evidence established the above facts, the trial court found that sixty dollars of the indebtedness of $86.30 were, under the laws of Illinois referred to, exempt from attachment under garnishment proceedings; that the garnishee had duly tendered and offered to pay into court the $26.30; that plaintiff had refused to release the garnishee or dismiss the garnishment except upon payment of the full sum of $86.30. Whereupon the court found that only this sum of $26.30 was subject to garnishment; that the garnishee had duly tendered and offered to pay it into court and plaintiff had refused it, and the court adjudged that the garnishee pay that sum into the registry of the court within five days from the date thereof, for the use of plaintiff, and that plaintiff pay the cost of the proceedings. From this judgment, after interposing a motion for new trial and saving exception to the action of the court in overruling it, plaintiff has duly perfected its appeal to this court.

Digitized by Google

While a number of points are made by the learned and industrious counsel for the respective parties, there are but two which we deem it necessary to consider and determine: First, whether the garnishee could set up the wage exemption, the defendant not appearing or interpleading; second, whether the courts of our State will recognize the statute of Illinois covering exemption of wages for labor performed in that State.

It is urged by the learned counsel for appellant that the right to exemption of this fifteen dollars is a personal privilege which can only be interposed by the debtor himself, and that he not having done so by way of interpleader or otherwise before the justice of the peace or the circuit court of our State, the garnishee cannot assert it for him. Counsel cites several cases which are supposed to be in support of this contention, among them Osborne v. Schutt, 67 Mo. 712 and Howland v. Chicago, R. I. & Pac. Ry. Co., 134 Mo. 474, 36 S. W. 29, which cases may be said to be typical of the others. On consideration of these cases, it does not appear that they are applicable here. In those cases and the like it is said that the claim to exemption is a personal privilege, but the exemption claimed was not alone wages, but exemptions given, for instance, under section 2180, Revised Statutes 1909. In such cases the matter of selection was largely with the debtor and is a personal privilege, the officer being required to apprise him of his right. It is then for the debtor to elect most of the articles he desires to have exempt. [See sections 2183, 2184, Revised Statutes 1909.] We think there is a marked difference between the law giving such exemptions and our own law (Sec. 2415, R. S. 1909), exempting a certain amount of wages from process of garnishment. It is there expressly provided that "no one shall be charged as garnishee for more than ten per cent of any wages," etc.

Digitized by Google

Under the Illinois statute pleaded and in evidence, "the wages for services of a wage-earner who is the head of a family and residing with the same to the amount of fifteen dollars per week," is not only declared to be exempt from garnishment but the law further provides: "Every employer shall pay to such wage-earner such exempt wages not to exceed the sum of fifteen dollars per week of each week's wages earned by him, when due, upon such wage-earner making and delivering to his employer, his affidavit that he is such head of a family and residing with the same, notwithstanding the service of any writ of garnishment upon such employer, and the surplus only above such exempt wages shall be held by such employer to abide the event of the garnishment suit." So that by our law, the garnishee is given an affirmative defense, and by the Illinois law he is required to pay the wages to the wage-earner, "notwithstanding the service of any writ of garnishment." No personal privilege of the debtor is here involved as in the Osborne and Howland cases, supra, and the like. The statutes of each State forbid the seizure of the wages by the process of garnishment and declare that no process of garnishment shall reach them. Our court has recognized this as a true interpretation of our law. Thus in Cooper v. Scyoc, 104 Mo. App. 414, l. c. 432, 79 S. W. 751, after setting out that the plaintiff, who was defendant in the action under which the garnishment had been sued out, had claimed his exemption at the beginning of the action and had continued to make his claim of exemption of his wages, it is said: "Even if he had made no claim to his exempt wages, there is no evidence that he waived his right, and without a waiver they should not be subject to the process of garnishment," referring to what is now section 2415, Revised Statutes 1909.

Again, in Barnes v. William Waltke & Co., 135 Mo. App. 488, 116 S. W. 7, our court, answering the propo-

Digitized by Google

sition that the debtor's salary exemption had not been mentioned in the garnishee's answer and therefore was waived, has said (l. c. 491): "No doubt it would be better to call attention to such a fact in answering, even though the interrogatories make no inquiry about it, as those before us made none; but we decline to hold the omission rendered the exemption unavailable to the garnishee as a defense, since the record contains proof of the essential facts that Mathias was head of a family and resident of the State and this evidence was palpably introduced to prove the immunity of all but ten per cent of his wages from levy. The immunity was asserted by the testimony and in the motion for new trial, which alleged an excessive judgment." The correctness of this rule is fully recognized in the decision of our Supreme Court in Davis et al. v. Meredith et al., 48 Mo. 263, where the claim to the wage exemption was made by the garnishees in their answer and sustained by our Supreme Court.

The law of Illinois not only gives this exemption to the laborer whenever it appears that he is the head of a family and resides with it, but exempts wages up to a certain amount from the process of garnishment and expressly requires the employer to pay such wage-earner the exempt wages. So, in effect, does our own statute. The exemption, therefore, is more than a mere personal privilege to be exercised by the judgment debtor. It is a positive prohibition against the employer paying over the wages specified under any process of garnishment and an affirmative defense for the garnishee as against that proceeding.

The evidence in the case amply sustains the finding of the trial judge that Perrina was not only a citizen of the State of Illinois, resident and domiciled therein, but that he was the head of a family for the whole period covered in this action, and that he had made the statutory demand required. If, then, we are

Digitized by Google

to recognize this law of the State of Illinois as applicable here, there can be no question but that the garnishee, even without the interposition of the debtor in the action, had a right, as a matter of defense in the garnishment proceedings, under the law of the State of Illinois, to set up this exemption of wages.

That brings us to the other question remaining for determination. That is, whether we are to recognize the above-mentioned statute of the State of Illinois. It was duly pleaded and given in evidence.

Comity between the several States and the courts thereof has been almost universally exercised throughout this country and recognized as a sound principle, particularly so in the administration of exemption laws. How far it shall go is often in question. The injustice of forcing one who is summoned as garnishee in the courts of one State to pay over moneys of the debtor in his hands and leaving him liable to be compelled, in another State by its courts, to again pay over the moneys on the same debt, is often assigned as a reason for its recognition. Our courts have distinctly recognized it in several cases, as see Banchor v. Gregory, 9 Mo. App. 102; Stoeckman v. Terre Haute & Indianapolis R. R. Co., 15 Mo. App. 503; Zuppann v. Bauer, 17 Mo. App. 678; Hurley v. Mo. Pac. Ry. Co., 57 Mo. App. 675; Carey v. Schmeltz, 221 Mo. 132, 119 S. W. 946. In Stoeckman v. Railroad Co., supra, our court, recognizing the rule as adopted by courts of high authority, adds (l. c. 508, referring to the New York Court), "And the courts are careful to say that it is not necessary that the foreign statute should resemble the New York statute in all its details. It is sufficient that the policy of the legislation of two States upon the subject of the right of action for such an injury is the same."

In Zuppann v. Bauer, supra, after calling attention to the homogeneity of our people and the nature of

Digitized by Google.

the federal union and the relations of the States of the Union to each other, it is said (l. c. 692): "Such being our situation and relations *inter sese*, the doctrine which assigns to the statutes of a sister State of the Union no greater credit or comity than would be assigned to the laws of a foreign State, seems to be narrow, barbarous and tribal." In Carey v. Schmeltz, supra (l. c. 136 and 139), recognizing the rule of comity, it is said that it is applicable when the law of the sister State is not contrary to the policy of our own State.

As will appear by examination of the authorities referred to, the courts of one State commonly recognize the laws of another State when the general policy of the two States on the subject is alike. That this is the case with respect to the statutes of Illinois and those of our own State on the matter of exemption of wages from garnishment proceedings, is clear. There is a difference in the amount of exemption; there is no difference whatsoever in policy.

Nor is recognition of the spirit of comity confined to the courts. Our lawmakers have not only recognized it, but enforced it by the Act of our General Assembly, approved April 18, 1911 (Laws 1911, p. 141). This act consists of three sections. By the first, the garnishment of wages, the attachment of wages, either in an original action by attachment or under garnishment proceedings, is prohibited unless personal service has been had upon the defendant, and unless the suit be brought in the county where the defendant resides or in the county where the debt is contracted and the cause of action arose or accrued, and the statement filed in the cause and the writ or summons of attachment or garnishment "shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose." The second section is distinctly founded on

Digitized by Google

comity. It provides that wages earned and payable out of this State "shall be exempt from attachment or garnishment in all cases where the cause of action arose or accrued out of this State, unless the defendant in the attachment or garnishment suit is personally served with process; and if the writ of attachment or garnishment is not personally served on the defendant, the court issuing the writ of attachment or garnishment shall not entertain jurisdiction of the cause, but shall dismiss the suit at the cost of the plaintiff. In all actions commenced in this State in which it is sought to garnish or attach wages, the petition or statement filed in such case and the summons or writ of garnishment or attachment shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose." By the third section of this act, all acts or parts of acts inconsistent or in conflict with it in so far as they are so inconsistent and are in conflict, are repealed. It is true that this act of April 18, 1911, did not go into effect until the 19th of June, 1911, and that before the last-named date the action before us had been instituted and the judgment rendered, the latter occurring June 5, 1911. It will be observed that there is no clause in this act saving actions then pending. Whether this act applies to this action, even its scope, need not now be determined. We refer to it solely as an emphatic recognition by the General Assembly of our State of the law of comity to as full an extent, nearly, certainly in line with, what had before then been held by the courts.

Under the Illinois law these wages up to fifteen dollars a week are exempt from process of garnishment there. Shall we, applying the Illinois law by comity, hold them exempt in our jurisdiction? We answer this in the affirmative.

We are not here considering the question of where the debt of the principal debtor was contracted; we

Digitized by Google

confine ourselves to a construction of the laws of Illinois, governing the matter of garnishment for wages earned in Illinois by one of its residents, payable there and attempted to be impounded here, and whether we will recognize and give effect to that law in our courts.

In recognizing the Illinois law under the rule of comity, the learned trial judge committed no error. The judgment is affirmed. *Nortoni* and *Allen, JJ.*, concur.

JOHN H. SCHROEDER WINE AND LIQUOR COMPANY, Appellant, v. WILLIS COAL AND MINING COMPANY, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 3, 1913. Opinion Filed December 2, 1913.

Schroeder Wine and Liquor Company v. Willis Coal and Mining Company, *ante*, followed.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Frank Landwehr for appellant.

Dawson & Garvin and *Leonard Wilcox* for respondent.

REYNOLDS, P. J.—While there are some differences as to the amount of the wages due and the debts, and other minor points, the substantial points presented for determination are the same as those which arose and are considered in the case of John H. Schroeder Wine & Liquor Co., Appellant, v. Willis Coal

Digitized by Google

& Mining Co., Garnishee of Perrina et al., Respondents, *ante*, p. 93. For the reasons stated in the opinion in that, the judgment of the circuit court in this cause is affirmed. *Nortoni* and *Allen, JJ.*, concur.

JOHN H. SCHROEDER WINE & LIQUOR COMPANY, Appellant, v, WILLIS COAL AND MINING COMPANY, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 3, 1913. Opinion Filed December 2, 1913.

Schroeder Wine and Liquor Company v. Willis Coal and Mining Company, *ante*, followed.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Frank Landwehr for appellant.

Dawson & Garvin and *Leonard Wilcox* for respondent.

REYNOLDS, P J.—While there are some differences as to the amount of the wages due and the debts, and on other minor points, the substantial points presented for determination are the same as those which and are considered in the case of John H. Schroeder Wine & Liquor Co., Appellant, v. Willis Coal & Mining Co., Garnishee of Perrina et al., Respondents, *ante*, p. 93. For the reasons stated in the opinion in that, the judgment of the circuit court in this cause is affirmed. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

JOSEPH C. SCHRODER, Appellant, v. WILLIS COAL AND MINING COMPANY, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 3, 1913. Opinion Filed December 2, 1913.

Schroeder Wine and Liquor Company v. Willis Coal and Mining Company, *ante*, followed.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Frank Landwehr for appellant.

Dawson & Garvin and *Leonard Wilcox* for respondent.

REYNOLDS, P. J.—While there are some differences as to the amount of the wages due and the debts, and on other minor points, the substantial points presented for determination are the same as those which arose and are considered in the case of John H. Schroeder Wine & Liquor Co., Appellant, v. Willis Coal & Mining Co., Garnishee of Perrina et al., Respondents, *ante*, p. 93. For the reasons stated in the opinion in that, the judgment of the circuit court in this cause is affirmed. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

ANTONE HEISLER, Appellant, v. MILTON G. CLYMER, Respondent.

St. Louis Court of Appeals. Submitted on Briefs November 4, 1913. Opinion Filed December 2, 1913.

1. **STATUTE OF LIMITATIONS: Five-Year Statute: Fraud and Deceit.** The petition, in an action for the value of certain shares of stock and for an accounting, alleged a purchase by defendant, as agent and trustee for himself, plaintiff, and three others, of 185 shares of stock of a corporation of which defendant and plaintiff were both stockholders; that he paid the purchase price with borrowed money, for which he gave his note, pledging the shares as security; that thereafter the corporation consolidated with another corporation; that defendant, acting as such agent and trustee, exchanged the 185 shares for stock in the consolidated company; that he notified plaintiff that his proportion thereof was 37 shares; that, relying upon this representation, is was agreed that plaintiff would take and pay for 25 shares, as he was not able to take the whole 37 shares; that the 185 shares were exchanged for 277½ shares in the consolidated company, and plaintiff was therefore entitled to 12½ shares additional; that defendant falsely and fraudulently stated to plaintiff that he was giving and transferring to him his full pro rata share; that plaintiff, having been long associated with defendant, reposed implicit faith and confidence in him, and fully relied upon such representation, and accepted and paid for the 25 shares, believing it to be true; that such representation was false and fraudulent, as defendant then held 12½ extra shares, which were the property of plaintiff; that defendant fraudulently concealed the truth from plaintiff, held the stock, and converted it to his own use, and thereafter concealed the truth and continued to secretly hold and use the stock or its proceeds; and that plaintiff had no knowledge whatever that defendant had concealed the fact of his having received such 12½ shares until within eight weeks before the filing of the suit, whereupon he demanded the stock or its value, and defendant again falsely represented that plaintiff had been given his full share of the stock. The transfer of such stock to plaintiff was more than five years before the bringing of the suit. Defendant pleaded the five-year statute of limitations, and the cause was submitted on an agreed statement, which did not show any act of concealment with any more particularity than the petition. *Held*, that a motion for judgment on the pleadings was properly sustained, as the petition did not show sufficient facts to bring the case within subdivision 5 of Sec. 1889,

Digitized by Google

R. S. 1909, providing that, in actions for relief on the ground of fraud, the cause of action is to be deemed not to have accured until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

2. ———: ———: ———. Under the fifth subdivision of Sec. 1889, R. S. 1909, providing that actions for fraud must be commenced within five years, but that the cause of action in such case shall be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud, the action must be brought within five years, and not within ten years, after the discovery of the facts constituting the fraud.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

N. P. Zimmer and Marion C. Early for appellant.

(1) The court erred in ruling that the five-year Statute of Limitations barred plaintiff's right of recovery. He relied upon the representations of defendant, which under the circumstances he was entitled to do. He was not obliged to make an independent investigation to discover fraud. He is entitled to the ten-year period of limitation of the statute even though it be held plaintiff's cause of action accrued when the stock was delivered in July, 1902. R. S. 1909, sec. 1889; Fitzpatrick v. Stevens, 114 Mo. App. 497; Ruff v. Milner, 92 Mo. App. 620. (2) One should not be allowed to avoid liability upon the ground that another trusted him. Upon the facts disclosed in the record silence upon the part of defendant amounted to fraudulent concealment. This should be held a continuing trust. Newberry v. Wilkinson, 199 Fed. Rep. 673; State v. Milwaukee, 138 N. W. 1006; Perry on Trusts, sec. 178; Callan v. Callan, 175 Mo. 346; Hudson v. Cahoon, 193 Mo. 547; Bank v. Thayer, 184 Mo. 61; Scott v. Boswell, 136 Mo. App. 601. (3) Upon the record

Digitized by Google

here the allegations of the petition and statement of facts are admitted. The cause should not, therefore, be remanded. The lower court should be reversed and judgment entered for appellant with decree for an accounting. Evidence improperly excluded should be considered as in the record on appeal. State v. Jablousky, 169 Mo. App. 238.

Schnurmacher & Rassieur for respondent.

(1) An action based on fraud, to recover a money judgment, is governed by the 5th subdivision of the five-year Statute of Limitations, whether the action be brought at law or in equity. Sec. 1889, R. S. 1909, subdivision 5. Johnson v. Railroad, 243 Mo. 278. This rule applies also to all trusts, except such as are cognizable only in equity. Landis v. Saxton, 105 Mo. 406; Johnson v. Railroad, supra. (2) To bring himself within the 5th subdivision of Sec. 1889, R. S. 1909, plaintiff must allege and prove facts showing diligence on his part to discover the alleged fraud or that defendant was guilty of acts which prevented plaintiff from making the discovery. No attempt was made to bring the case within this rule. Johnson v. Railroad, supra; State ex rel. v. Yates, 231 Mo. 276; Callan v. Callan, 175 Mo. 346; Shelby County v. Bragg, 135 Mo. 291; State ex rel. v. Musick, 145 Mo. App. 33; Scott v. Boswell, 136 Mo. App. 601. (3) Under the facts averred, the defendant cannot be regarded as a trustee for plaintiff. The shares were purchased by defendant with his own money and became his property, in his own right—subject only to his oral agreement to permit the plaintiff and others to participate in the purchase. The right of action, then, is an action based upon this oral agreement, and the same is likewise barred by the five-year statute. (4) The petition shows that whatever may have been the arrangement of the parties in 1900, nevertheless in 1902 a different

Digitized by Google

arrangement was, in lieu thereof, agreed upon, and no action based upon the original agreement could be enforced, even if the Statute of Limitations did not bar such action.

REYNOLDS, P. J.—This is an action to recover the value of certain shares of stock, charged to have been converted by defendant to his own use, July 15, 1902, and for an accounting of the profits received by defendant from time to time as the holder of these shares. The statement of the case by counsel for respondent is brief and fair, so that we adopt it, not literally, but substantially, as a summary of the amended petition on which the case went to trial.

It is alleged in that petition, that in 1896, plaintiff Heisler, defendant Clymer and several others organized the Columbia Preserving Company and agreed with each other that the interest of each should be and always remain the same; that in January or February, 1900, two of the stockholders, owning 185 shares, wanted to sell their shares and that plaintiff, defendant and three other stockholders then owning all of the stock except the shares so offered for sale, agreed to purchase these 185 shares; that defendant was selected as the agent of the five and, acting as such agent and trustee, but in his own name, purchased the 185 shares at and for the price of $15,000, borrowed the money for this purchase, giving his own note for it, and pledged the shares as security for the debt incurred by him in the purchase; that defendant took the title to the stock in his own name, although he was in fact holding it in trust for the five parties; that in March, 1900, the stockholders of the Columbia Preserving Company voted to unite that company with the St. Louis Syrup & Preserving Company, and the latter company agreed to the consolidation, provided defendant and his associates would purchase the 185

Digitized by Google

shares above referred to from the then holders of those shares; that on the consolidation of the two companies, defendant, acting as such agent and trustee, exchanged the 185 shares of Columbia Preserving Company stock for stock in the St. Louis Syrup & Preserving Company, which stock was issued to defendant but held by him as such agent and trustee for the five original parties. It is then alleged that on or about July 15, 1902, plaintiff was notified by defendant that plaintiff's pro rata of the stock of the St. Louis Syrup & Preserving Company was thirty-seven shares, and that the shares were ready for distribution. (We add here that it appeared by the agreed statement that the note for $15,000, which defendant had given had matured and that it and its accrued interest had to be paid, and that plaintiff was then, that is in July, 1902, called upon to pay his proportion of the note and accrued interest, upon doing which he would receive his proportionate number of the 185 shares.) It is further averred that relying upon this representation of the defendant, it was agreed between plaintiff and defendant, "that plaintiff would take and plaintiff did take and pay for twenty-five shares of said stock at and for the sum of $2500, for the reason that at that time plaintiff was not able to take all of said thirty-seven shares." It is then charged that defendant had received in exchange for these 185 shares of Columbia Preserving Company stock 277½ shares of the St. Louis Syrup & Preserving Company stock, therefore plaintiff avers that he (plaintiff) is entitled to have one-half share additional with each of the twenty-five shares of stock so transferred to him, or twelve and a half shares additional. That part of the petition charging fraud is as follows:

"Plaintiff further states that at the time, to-wit, on or about July 15, 1902, said defendant notified this plaintiff that said stock was ready for distribution among the persons aforesaid, he falsely and fraud-

Digitized by Google

ulently stated to this plaintiff that he was giving and transferring to him his full pro rata share of said stock, and plaintiff having been long associated with defendant in business, reposed implicit faith and confidence in said defendant and fully relied upon said representations of defendant, believing the same to be true, accepted and paid for twenty-five shares of said stock. Plaintiff further says when defendant represented to plaintiff that he was transferring to him all the stock to which he was entitled said representation was false and fraudulent for the reason that in truth and in fact defendant at the time held said extra twelve and a half shares as aforesaid which was in truth the property of this plaintiff, and he was entitled to have the same. But plaintiff says that defendant so fraudulently concealed the truth from this plaintiff, held said stock, transferred and converted the same to his own use and ever thereafter concealed the truth from this plaintiff and continued to secretly hold, use said stock or its proceeds.

"And plaintiff says that said defendant Clymer held and now holds said twelve and one-half shares of said stock so fraudulently concealed and held back from this plaintiff and converted the same to his own use. Plaintiff further says that he had no knowledge whatever that said defendant had so concealed the fact of his having received said twelve and one-half shares of said stock and so wrongfully converted the same to his own use until within the last eight weeks before the filing of this suit, whereupon he demanded of defendant said stock or its value and accumulated dividends, which was by defendant refused, said defendant at said time again falsely representing to plaintiff that he had already been given his full share of said stock. That said fraud remained and was kept secret and concealed from this plaintiff until it was so discovered by him at the time stated, and this

Digitized by Google

suit is filed within less than ten years after the commission of said secret fraud upon this plaintiff."

Plaintiff further charges that the St. Louis Syrup & Preserving Company stock was transferred by defendant to the Corn Products Company; that defendant had received large dividends on the stock which he had also converted to his own use and that the twelve and one-half shares are now worth $6000. Judgment is prayed against defendant for the value of this stock, namely, $6000, together with all dividends collected by him from and after the date of the conversion, and that defendant be compelled to account for all profits realized through sales and transfers of the stock and for such other and further relief as to the court might seem just and proper.

Defendant filed a general denial of the allegations of the petition and also pleaded the five-year Statute of Limitations as a bar to the action.

The cause coming on for hearing before the court, counsel for plaintiff made a statement to the court of what the evidence would show to be the facts in the case, of which it may be said that it covered, but somewhat more in detail, the facts set out in the petition. It is to be especially noted that this statement went no further into any particularization of acts of concealment than does the petition, all of the averments of which as to that are given in the above quotation from the petition itself. At the conclusion of this statement, by agreement of counsel, the cause was submitted to the court on the statement and pleadings and on a motion of defendant for judgment on the pleadings. This motion was sustained, judgment accordingly being entered in favor of defendant. Saving exception, interposing a motion for a new trial and excepting to that being overruled, plaintiff has brought the case here on appeal, assigning as errors the action of the court in sustaining the demurrer and motion for judgment on the pleadings; that the court erred in hold-

Digitized by Google

ing, under the petition and statement of facts, that the cause of action was barred by the five-year Statute of Limitations; that the court erred in ruling that plaintiff was barred by the Statute of Limitations because plaintiff had relied upon representations made by defendant, thus allowing defendant to benefit by his own fraud; that under the admitted facts the court erred in refusing to enter a judgment and decree for plaintiff for the value of the stock in question and for an accounting; that the court erred in denying the contention of plaintiff that he was protected and entitled to recover under the ten-year Statute of Limitations; that the court erred in entering judgment for defendant on the admitted facts and in overruling plaintiff's motion for a new trial.

It will be apparent from an examination of the averments of the petition, and these confirmed by the statement, that the transaction upon which the cause of action is founded, took place on or about the 15th of July, 1902, that being the date upon which it is alleged that defendant, notifying plaintiff that the stock was ready for distribution among those entitled to it, had falsely and fraudulently stated to plaintiff "that he was giving and transferring to him his full pro rata share of said stock," stating that at thirty-seven and one-half shares, and had transferred and delivered to plaintiff twenty-five shares at $2500, that being all of the shares plaintiff was then able to pay for. The ground of attack upon the petition and the sufficiency of the facts stated is, that neither in the petition nor in the statement of facts plaintiff proposed to prove, is it anywhere alleged that defendant ever stated anything or did anything which would prevent plaintiff, if he had exercised ordinary diligence, from discovering at the time, that is, in July, 1902, the facts which he now alleges to be facts, and that although the Statute of Limitations had been pleaded by defendant, plaintiff had not, by reply, set up any facts which

Digitized by Google

would entitle him to the benefit of the fifth clause or subdivision of section 1889, Revised Statutes 1909.

This action was commenced March 7, 1910. It is contended that considering the facts pleaded and also stated as the facts which could be proved, plaintiff had not made out a case which brought him outside the operation of the five-year limitation and within the exceptions of this fifth clause of section 1889 (Statute of Limitations). This section 1889 designates what actions shall be barred in five years, the fifth subdivision, among others, including actions for relief on the ground of fraud, provided that "the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." It is claimed, and this is the theory upon which the learned trial court acted, that the facts which counsel for plaintiff had pleaded and had announced in his opening statement that he expected to prove, were not facts which would take the case out of the operation of the statute; that no explanation whatever was offered to show why plaintiff, who was himself a stockholder of the Columbia Preserving Company, and who claims to have been interested to the extent of one-fifth in the 185 shares purchased by defendant, should not have known that the shares purchased by defendant were exchangeable like all the rest of the stock, on the basis of one share of the old for one and a half shares of the new stock; nor was any explanation made to show why plaintiff did not learn from his three other associates, all interested with him in the purchase of the 185 shares, the disposition defendant had made of the 185 shares and of the shares received from the St. Louis Syrup & Preserving Company in exchange therefor; nor was any explanation made to show why plaintiff did not go to the books of the corporation and there ascertain that defendant had received one and a half shares of the new for each share of the old stock

Digitized by Google

which he turned in, and which plaintiff had received upon his own stock; nor is it claimed that plaintiff ever inquired of defendant as to the number of shares of the new company he had received in exchange for the 185 shares of the old.

This is the summary of the statement of the position of defendant in the case. An examination of what transpired before the court when plaintiff was making his statement and when the petition and the facts stated were under consideration by the court, shows that these were the points involved, and that they covered the one point particularly involved, namely, the application of the exception in the fifth subdivision of section 1889. It is evident that the reference by plaintiff, in his assignment of errors, to the ten-year Statute of Limitations, is to the ten years mentioned in this subdivision five and not to the ten-year limitation covered by section 1888, as there is no pretense that this action falls within section 1888.

Keeton's Heirs v. Keeton's Admr., 20 Mo. 530, is, so far as we are aware, the first case in which the construction of the Statute of Limitations and the disabilities and exceptions contained therein, appears to have come before our Supreme Court for full consideration. It is true that a paragraph of the opinion, to the effect that parties not barred could not unite in action with those who were, was held no longer to be true, owing to a subsequent change of the statute, in Sutton v. Dameron, 100 Mo. 141, l. c. 154, 13 S. W. 497, but save as to that point the case has often been cited and followed. As applicable to the case at bar, it is to be noted that it is said in this Keeton case (l. c. 542), that where the answer sets up the Statute of Limitations as a defense and there is no averment in the petition itself, or in the reply, pleading the exceptions contained in the statute, that no evidence could be received in relation to them; "for the evidence, to be

Digitized by Google

admissible, must be founded on some allegation in the pleadings."

In Landis v. Saxton, 105 Mo. 486, l. c. 489, 16 S. W. 912, answering the question as to whether the action of the plaintiff in that case was barred by this fifth subdivision of section 1889, it is said: "The trusts against which the statute will not run 'are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction' of a court of equity, but other trusts which are the ground of an action at law are open to the operation of the statute. [Kane v. Bloodgood, 7 John. Ch. 90.] The kind of trusts which fall within the exclusive jurisdiction of a court of equity are direct trusts, created by deed or will, or by apointment of law, e. g., executorships or administrations; but cases of constructive or implied trusts, which result from partnerships, agencies and the like, are subject to the operation of the statute. [Farnam v. Brooks, 9 Pick. 212.] The crucial test in all such cases is: Is there a remedy at law? If there is, that is a conclusive answer to the claim that a technical trust as aforesaid has been created. [Murray v. Coster, 20 Johns., loc. cit. 583.]"

This same rule was announced in Shelby County v. Bragg, 135 Mo. 291, 36 S. W. 600. There at page 296, it is said: "The rule is that in implied trusts which grow out of the facts and circumstances of each case, the statute commences to run as soon as a party has a right to commence a suit to declare and enforce it." Keeton's Heirs v. Keeton's Admr., supra, is cited for this.

In Callan v. Callan, 175 Mo. 346, 74 S. W. 965, referring to Shelby County v. Bragg and quoting from Farnam v. Brooks, supra, to the effect that if the aggrieved party knew of the fraud when it was committed, or had full possession of the means of detecting it, which is the same as knowledge, neglect to bring

Digitized by Google

forward the complaint for more than the statutory period, will deprive him of his remedy, and it is there noted that the authorities are all one way upon this question. After citing many of them, it is said (l. c. 361), quoting from Wood on Limitations (3 Ed.), sec. 276: "The bill or complaint should set forth the nature of the transaction fully, and also the acts of concealment, and the time of its discovery. . . . The concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character and must be alleged and proved so as to bring the case clearly within the meaning of the statute." After citing cases, the court continues (l. c. 361): "While the petition alleges that the fraud complained of was not discovered by plaintiff until September, 1898, it does not allege what the discovery was, nor does the proof show that it was by reason of anything that defendant said or did that it was not discovered earlier."

State ex rel. v. Yates, 231 Mo. 276, 132 S. W. 672, is to the same effect.

In the recent case of Johnson v. United Railways Co., 243 Mo. 278, 147 S. W. 1077, quoting approvingly from Bent v. Priest, 86 Mo. 475, that this fifth clause of section 1889 applies to equitable as well as legal causes of action, it is further held that the cause of action involved was barred by the five-year statute, whether plaintiff and those from whom he purchased knew of the transaction or not, "for the reason that the facts were open and known, appearing upon the records of the corporation. . . . No act of concealment of the facts is shown." Authorities are cited sustaining the proposition that, "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. . . . A party cannot avail himself of this exception to the statute when the

Digitized by Google

means of discovering the truth were within his power and were not used. . . . Our conclusion is that it (the cause of action) accrued when plaintiff discovered the fraud; or when, by proper diligence as an ordinarily prudent man, he, under the circumstances, should have discovered it." The clause of the statute, it is further held, applies only to technical, express trusts, trusts created by deed or by will; does not cover implied trusts; referring to and quoting from Shelby County v. Bragg, supra. It is further there held that to prevent the statute from running, there must be concealment, and mere silence is not concealment; there must be some direct contrivance intended to exclude suspicion and prevent inquiry, and where the transactions alleged to have been fraudulent were open to plaintiff, no concealment can be said to exist, for the means of knowing are held to be knowledge. The rule as to concealment and knowledge, it is further there held, does not apply to a party sustaining a fiduciary relation to plaintiff in a suit to compel that party to account for trust funds fraudulently converted to his own use, but such a relation of trust exists only where there is an express trust created by deed or will, or by law, and finally that the five-year statute is a bar to a suit to recover moneys converted to his own use by a constructive trustee of an implied trust, unless there has been such concealment of the facts as to defeat discovery. That the acts of concealment must be pleaded and proved, is universally held in all the authorities. Upon a practically unbroken line of authorities, the judgment of the learned trial court is right.

We are unable to find anything in the cases cited by learned counsel for appellant which lends support to the position here taken by them, to the effect that plaintiff was entitled to bring his action at "any time within ten years" of the discovery of the facts constituting the fraud. The authorities all hold, passing

Digitized by Google

on this very clause, that the right of action in a case such as this falls within the five-year limitation.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

CENTURY REALTY COMPANY, Respondent, v. FRANKFORT MARINE ACCIDENT AND PLATE GLASS INSURANCE COMPANY and TRAVELERS INSURANCE COMPANY, Defendants; FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 5, 1913. Opinion Filed December 2, 1913.

1. **LIABILITY INSURANCE: Policy Construed: Maximum Liability: Interest and Costs.** A policy of insurance indemnified insured against loss arising from legal liability for damages on account of bodily injury suffered by any person as a result of an accident happening on the premises of insured, but provided that insurer's liability should in no case exceed $5000. Subsequent clauses of the policy provided that, in case legal proceedings were taken on a claim against insured, the insurer should, at its own cost, undertake the defense of such proceedings, and should have entire control of such defense, but if it should offer to pay insured the full amount for which it is liable, it should not be bound to defend, nor be liable for any costs or expenses which insured might incur in defending, and that insured should not, except at his own cost, settle any claim nor incur any expenses without the consent of insurer. A judgment against insured in the amount of $5000, for injuries covered by the policy, was affirmed by the appellate court, and insured paid the amount, plus interest and costs. Insurer conducted the defense of the case and caused the appeal to be taken. *Held*, that, under the terms of the policy, insured's right of action did not depend upon a judgment being first rendered against it in the personal injury action, but that its right to indemnity accrued when the accident occurred, and insurer having conducted the defense and caused the appeal to be taken, was liable for court costs and interest on the judg-

Digitized by Google

ment, under the provision that it should, "at its own cost, undertake the defense," notwithstanding these items, added to the amount of the judgment, exceeded the amount of the stipulated maximum liability; interest being the compensation paid by a debtor for the detention of the debt, and insurer having delayed the payment, interest must be considered as part of the costs and expenses of the litigation.

2. **INSURANCE: Construction of Policy.** The terms and conditions of an insurance policy, if ambiguous or of doubtful meaning, are to be construed most strongly against insurer.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin,* Judge.

AFFIRMED.

Seddon & Holland for appellant.

The court erred in giving the peremptory instruction to the jury to find a verdict in favor of plaintiff and against defendant, Frankfort Insurance Company, in the sum of $6753.40 with interest from June 25, 1910. (a) Because the policy of the Frankfort Insurance Company was a contract of indemnity against loss and the Frankfort Insurance Company was not liable to the Century Realty Company in any amount until the Century Realty Company sustained a loss. But when such loss was sustained, the limit of liability of the Frankfort Company was $5000, the amount specifically mentioned as the limit in said policy. Authorities under headings b and c infra. (b) The special agreement under which the Frankfort Insurance Company agreed to defend suits at its own cost did not impose any liability upon the Frankfort Company to pay interest on the judgment in excess of the limit of the policy, to-wit, $5000. Conqueror v. Aetna Ins. Co., 152 Mo. 332; Maryland Casualty Co. v. Omaha Electric L. & P. Co., 157 Fed. 514; Finley v. U. S. Casualty Co., 113 Tenn. 592; Davison v. Maryland Casualty Co., 197 Mass. 166; Puget Sound Improve-

Digitized by Google

ment Co. v. Frankfort Ins. Co., 52 Wash. 121; Frye v. Gas & Electric Co., 97 Me. 241; Henderson v. Maryland Casualty Co., 29 Pa. St. 328. (c) Because the special agreement under which the Frankfort Company agreed to defend suits at "its own cost" did not impose upon said company any obligation to pay court costs incurred in any proceeding of an injured party against Century Realty Company. Munro v. Maryland Casualty Co., 96 N. Y. Sup. 205; National & Providence Mills v. Frankfort Insurance Co., 28 R. I. 126.

Watts, Gentry & Lee for Travelers Insurance Company.

Dawson & Garvin and *Leonard Wilcox* for respondent.

(1) The Frankfort Company is liable for the interest on the amount of the verdict, viz., $5000, from the date of the verdict, as a matter of contract, but if not then, as a matter of substantive law. Insurance Co. v. Gas Light Co., 150 Ky. 132; Saratoga T. R. Co. v. Ins. Co., 128 N. Y. Sup. 825; Creem v. Fidelity Co., 126 N. Y. Sup. 557; Cudahy, Etc., Co. v. Casualty Co., 132 Fed. 623; Lumber Co. v. Fidelity Co., 63 Minn. 293; Sanders v. Frankfort Ins. Co., 72 N. H. 485, 492; Rumford, Ets., Co. v. Fidelity Co., 92 Me. 574; Mining Co. v. Casualty Co., 143 Mo. App. 563; Saratoga, Etc., Co. v. Ins. Co., 128 N. Y. Sup. 828. (2) The Frankfort Company is liable for the costs of the court paid by plaintiff on execution. Zinc Co. v. Ins. Co., 152 Mo. App. 339; Maryland, Etc., Co. v. Omaha, Etc., Co., 157 Fed. 514; Myton v. Fidelity Co., 117 Mo. App. 452; Mining Co. v. Casualty Co., 143 Mo. App. 563; Cudahy, Etc., Co. v. Casualty Co., 132 Fed. 623; Tel. Co. v. Ins. Co,, 121 N. Y. Sup. 565; Brewster v. Surety Co., 130 N. Y. Sup. 439; Mandell v. Fidelity Co., 170 Mass. 178. (3) There being in the Frankfort policy no pro-

Digitized by Google

vision like that numbered 14 in the Travelers' (see Abs., p. 45), the promise of the Frankfort was to indemnify when liability was established by judgment, not to indemnify for a loss actually sustained and paid after a trial resulting in a judgment. Saratoga, Etc., Ins. Co., 128 N. Y. Supp. 825, and other authorities under point I, *supra*. (4) The policy must be construed most strongly against the assured. Grocery Co. v. Guaranty Co., 130 Mo. App. 429; Mining Co. v. Casualty Co., 143 Mo. App. 563. (5) The words "at its own cost" in warranty No. 3 must have the same meaning as the same words used in warranty No. 4, where the word "cost" necessarily includes interest on the verdict; accruing pending appeal, and court costs. (6) If the Frankfort Company is not liable for the interest and court costs, or either of them, the Traveler's Company is liable under its policy, as a part of the "loss". Worsted Mills v. Ins. Co., 28 R. I. 126. (7) The order sustaining the motion for a new trial and the subsequent appeal did not vacate the judgment of 1906. They merely suspended it. Lewis v. Railroad, 59 Mo. 495; Crawford v. Railroad, 171 Mo. 82; Maryland, Etc., Co. v. Omaha, Etc., Co., 157 Fed. 515.

STATEMENT.—On April 29, 1903, one May Travis Cooper sustained injuries from an accident in a passenger elevator located in the Century Building in the city of St. Louis, the elevator owned and operated by the Century Realty Company. She instituted action against that company to recover her damages, placing the amount at $25,000. The cause came on for trial and, on January 12, 1906, resulted in a verdict for her in the sum of $5000, judgment following on that day for that amount and costs, the judgment to bear interest at the rate of 6 per cent per annum from that date. On motion for a new trial, filed by the Century Realty Company, defendant in that case, respondent here, the circuit court set aside the verdict and judg-

Digitized by Google

ment and ordered a new trial. From this May Travis Cooper appealed to the Supreme Court. That court, on December 23, 1909, set aside the order of the circuit court granting a new trial and reversed the judgment with directions to the circuit court to reinstate the judgment as of date January 12, 1906, the judgment to bear interest from that date. [See Cooper v. Century Realty Co., 224 Mo. 709, 123 S. W. 848.] The mandate of the Supreme Court was thereafter filed in the circuit court, and on January 5, 1910, that court entered up judgment in favor of May Travis Cooper and against the Century Realty Company for $5000, as of date January 12, 1906, that amount to bear interest at 6 per cent from that date, and also for costs and charges therein expended. Execution issued on this judgment, under which property of the Century Realty Company having been levied upon and advertised for sale, the Century Realty Company, on June 25, 1910, paid in satisfaction of the judgment the sum of $6753.40, that amount made up of the $5000 damages, $1337.50 interest accruing from January 12, 1906, and $415.90 for court costs.

At the time the accident above referred to happened, the Century Realty Company held policies in two companies, both policies having first been issued in the name of the Century Building Company and others named, payable to them, "as their interests might appear," but afterwards and before the happening of the accident, the Century Realty Company was substituted as the assured in place of the Century Building Company. Each of these policies covered the freight and passenger elevators situated in the building then owned by the Century Building Company, later by the Century Realty Company. For convenience and brevity, in speaking of the insured, we will designate it either as the Century Company, or as the Realty Company, although in the policies the former name, Century Building Company, is in fact

Digitized by Google

used. It is conceded that the accident happened to May Travis Cooper while a passenger in one of the passenger elevators.

The policy issued by the Frankfort Marine Accident & Plate Glass Insurance Company, of Frankfort-on-the-Main, Germany, hereinafter called the Frankfort Company, being the appellant herein, is designated "General Liability Policy." By it that company, in consideration of a premium stated, agreed to indemnify the Century Company "against loss arising from legal liability for damages on account of bodily injury or death suffered by any person or persons whomsoever resulting from any and every accident of whatsoever nature of cause happening in, upon, or about the premises of the assured, or happening in, upon or about any of the seven passenger elevator or freight elevators, . . . or the machinery and appliances connected therewith and together comprising the elevator service, . . . but the liability of the company in respect to any one person suffering injury or death shall in no case exceed the sum of $5000, nor shall the total liability of the company in respect to any one accident resulting in injury to or the death of several persons in any event exceed the sum of $10,000." It is expressly warranted and agreed (1) . . . (2) That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall give immediate notice in writing of the accident to the company and shall likewise give immediate notice of any legal proceedings instituted to enforce such claim.

"(3). That if any legal proceedings are taken to enforce a claim against the assured, covered by this policy, the company shall, *at its own cost,* undertake the defense of such legal proceedings in the name and on behalf of the assured and shall have the entire control of such defense. But if the company shall offer to pay to the assured the full amount for which

Digitized by Google

the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings *nor be liable for any costs or expenses which the assured may incur in defending the same.* The assured at all times shall, under the direction of the company, render all reasonable and necessary assistance to enable the company to effect settlements or to properly conduct a defense or to prosecute an appeal.

"(4) That the company may undertake *at its own cost* the settlement of any claim, duly reported to it as before provided, and the assured shall not, except at *his* (*sic*) *own cost,* settle any claim nor incur *any expense* without the consent of the company thereto previously given in writing; provided however that such immediate medical and surgical relief to the injured may be furnished as may be imperative at the time of the accident and reasonable expenses thus incurred shall be deemed a part of the liability of the company." (Italics ours.)

The policy of the Frankfort Company was dated June 7, 1902, was for a term of one year but was extended June 18, 1902, for a term of twelve months, the accident occurring within this second period.

The policy issued by the Travelers Insurance Company, of Hartford, Conn., hereinafter referred as the Travelers, or Travelers Insurance Company, in consideration of premiums stated, agreed to indemnify the Century Company for a period of three years, beginning on the 11th of June, 1902, "against loss from common law or statute liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy, by any person or persons, while in the car of the elevator mentioned in said application, or in the elevator well or hoistway of same, or while entering upon or alighting from the car," and it is set out in the policy that,

Digitized by Google

"in consideration of the rate of premium at which this policy is issued, it is hereby understood and agreed that other like and prior insurance shall be maintained by the assured in some other company, with like limits of liability, under said prior insurance, of $5,000 in respect to any one person and $10,000 in respect to any one accident causing injury to more than one person; and that this company shall only be held liable under this policy (subject to the limits of insurance therein made) for any loss sustained by the assured in excess of the amount covered by said prior insurance."

Among the conditions written in the policy and here involved, are, first, "the company's liability for an accident resulting to, or in the death of, one person is limited to $5000."

"14th. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself *to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.* No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiration of such period, there is such an action pending against assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above," etc. (Italics ours.)

Holding these two policies when the accident happened, the Century Company forthwith notified the two companies of it and likewise at once notified them of the bringing of the action against it by May Travis Cooper. Thereupon the Frankfort Company took charge of the action through its own attorneys and followed it through the circuit court and the Supreme Court and again in the circuit court to its termination, as hereinbefore noted. The Travelers took no active

Digitized by Google

hand whatever in the management of the case, although its local attorneys kept watch of the case in its progress through the courts, but in no manner whatever interfering or controlling its management. The Frankfort, it was admitted, had paid all attorney's fees, printing of briefs, travelling and all other expenses incident to the defense in the circuit and Supreme Courts, barring interest, if we are to class that as an "expense."

After the reversal of the judgment in the Cooper case by the Supreme Court and the payment of that judgment in the amount before stated, the Century Realty Company demanded payment of the amount which it had paid by way of debt, interests and costs from the two companies. The Frankfort Company, on August 6, 1910, in and through a written notice, offered and tendered to the Century Realty Company $5035.08, as in full settlement and satisfaction of any and all claims of whatsoever nature, which the Century Realty Company had or might thereafter have against it under the policy referred to, that is, $5000 on the debt and $35.08 interest on that sum, at the rate of 6 per cent from June 25, 1910, the date the judgment was finally entered, to August 16, 1910, the date of the tender. The Realty Company refused to receive this in full settlement. The Travelers, denying any liability whatever, made no tender.

Thereupon the Century Realty Company instituted separate actions against each of the companies. On motion and by agreement of parties the two actions were consolidated by the circuit court and heard as one action before the court and a jury. At the trial the facts were practically undisputed and were developed as we have set them out. The Frankfort Company introduced no evidence, its counsel stating he was satisfied to rest upon the evidence which had been introduced by the plaintiff. The Travelers introduced evidence tending to show that it had taken no active part

Digitized by Google

whatever in the management of the case of May Travis Cooper v. The Century Realty Company, but had been satisfied to leave the defense of that case in the hands of the attorneys for the Frankfort Company; had paid no part of the expense connected with the litigation, none of which had ever been demanded of it; that its local counsel "in a way" watched the case, not as of counsel in the case, but simply watched the attorneys for the Frankfort Company try the case, watching what was going on, and reporting to their client what had happened, but they took no part in the trial, filed no pleadings nor did anything else in connection with the case, apparently satisfied, as counsel for the Frankfort modestly suggested, that the conduct of the defense was in able hands.

At the close of the testimony in the case at bar, the Frankfort Company, among other requests, asked the court to instruct the jury that under the law and the evidence in this case, the plaintiff "cannot, under any circumstances, recover against the Frankfort Marine Accident & Plate Glass Insurance Company for an amount in excess of $5035.08." This was refused. Of its own motion the court instructed the jury, that under the pleadings and evidence it would find and return a verdict in favor of defendant Travelers Insurance Company, and would find and return a verdict in favor of plaintiff and against defendant Frankfort Marine Accident & Plate Glass Insurance Company, in the sum of $6753.40, with interest thereon from June 25, 1910, at the rate of 6 per cent per annum. Verdict accordingly, judgment following. Saving exception to the refusal of the instruction it had asked and to the giving of the one above set out, the Frankfort Insurance Company filed its motion for a new trial. Plaintiff also filed its motion for a new trial as to the Travelers Insurance Company, treating it as filed both in the original case of the company and in the consolidated case. These motions were

Digitized by Google

overruled, exceptions saved by the several parties and the causes appealed to this court.

REYNOLDS, P. J. (after stating the facts).—While all three of the cases were briefed and argued together before us, the case now to be considered relates to the appeal of the Frankfort Marine Accident & Plate Glass Insurance Company, but in consideration of that we are compelled, in a measure, to consider the position of the Travelers Insurance Company also, more incidentally, however, than directly.

Taking up this Frankfort case, counsel for that company, the appellant here, make two assignments of error. First, that the court erred in giving the peremptory instruction for a verdict in favor of plaintiff and against defendant Frankfort Insurance Company, in the sum of $6753.40, with interest from January 25, 1910; second, that the court erred in refusing to give the instruction asked by the Frankfort Company at the close of all the evidence.

These two assignments of error present two theories in antithesis: if the one is right, the other is wrong. The consideration of the action of the court in refusing one instruction necessarily involves that of its action in giving the other.

In support of their assignments, learned counsel for appellant, in brief, contend that the court erred in giving the instruction directing a verdict for the respondent against the Frankfort Insurance Company, because the policy of that company, it is claimed, was "a contract of indemnity against loss," and it was not liable to the Realty Company in any amount until the Realty Company sustained a loss, that when that loss was sustained the limit of the liability of the Frankfort Company was $5000, the amount specifically mentioned as the limit in the policy. As necessarily following from this, it is argued, that the special agreement under which the Frankfort Company agreed to

Digitized by Google

defend suits at its own cost, did not impose any liability on that company to pay interest on the judgment in excess of the limit of the policy, and that the special agreement under which the Frankfort Company agreed to defend suits at its own cost, did not impose upon that company any obligation to pay court costs incurred in any proceeding of an injured party against the Realty Company.

Counsel for appellant cite Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co., 152 Mo. App. 332, 133 S. W. 156, in support of their contention. The decision in that case is against counsel in so far as concerns the matter of court costs, for there it is distinctly held that the insurer is responsible to the assured, in addition to the maximum amount of indemnity provided for in the policy, for the court costs incurred and paid. It is true that it is further there held that the insurer was not liable for interest that had accrued on the judgment. That part of this decision is not determinative here. The policy involved in the Conqueror Zinc & Lead Company case is identical in its provisions, so far as this point is concerned, with that issued by the Travelers Insurance Company, but differs in its language from that of the Frankfort, and the conclusion that the Aetna Life Insurance Company was not liable for more than the assured had in fact paid only up to $5000, is reached on the ground that its policy distinctly provided: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue." On this provision it was held the Aetna Company was not liable for interest, and that plaintiff there could only recover what it had paid out up to $5000. Hence the Conqueror Zinc & Lead Company case lends no aid to the contention of the appellant here, unless we are to

Digitized by Google

hold that the Frankfort policy, under its wording, is susceptible of the same interpretation. That is a question which we will consider hereafter.

Counsel for the Frankfort also rely upon Maryland Casualty Co. v. Omaha Electric Light & Power Co., 157 Fed. Rep. 514; Finley v. United States Casualty Co., 113 Tenn. 592; Davison v. Maryland Casualty Co., 197 Mass. 167; Puget Sound Improvement Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 52 Wash. 124; Frye v. Bath Gas & Electric Co.,97 Me., 241; and Henderson v. Maryland Casualty Co., 29 Penn. Sup. 398, in support of the proposition that the Frankfort was liable only for the amount paid, after payment by the assured. The policies in each of these cases expressly provided, as did that in the Conqueror Zinc Company case, and as does that of the Travelers Insurance Company, that no action should lie against the company except to reimburse the assured "for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue;" if not in these words, in words of like tenor. These are all the cases cited by counsel for the Frankfort in support of their first proposition.

In support of their proposition that "court costs" are not to be included when they exceed the $5000 maximum, counsel for the Frankfort cite Munro v. Maryland Casualty Co., 96 N. Y. Supp. 705, and National & Providence Worsted Mills v. Frankfort Marine Accident & Plate Glass Ins. Co., 28 R. I. 126. The learned judge in the Munro case, supra, reaches his conclusion mainly on the authority of Connolly v. Bolster, 187 Mass. 266. But that case was on a policy similar in respect to those in the cases above cited and is not in point here. Moreover, so far as he holds the insurer not liable for costs, his decision runs counter to the majority of the above cases cited by counsel themselves on the first proposition, and as to nonliability for costs, is disaffirmed by the Supreme Court of New York, Appell-

Digitized by Google

ate Division, in Brewster v. Empire State Surety Co., 130 N. Y. Supp. 439. The Munro decision was by the Supreme Court at *nisi prius*, not in an appellate division. The Rhode Island decision confessedly rests on the Munro decision, supra, inadvertently treating it as a decision in the Appellate Division of the New York Supreme Court. The Rhode Island court, while following the Munro decision, says, as is also said in the Munro case, that the cases are conflicting and the Rhode Island court concludes to follow the Munro case.

Counsel for the Frankfort Company cite Finley v. Casualty Co., supra. That case, as well as Frye v. Bath Gas & Electric Co., supra, was one in which the party injured attempted, by suit in equity, to hold the insurer liable for injuries sustained, on the ground either that the assured was bankrupt or had made a fraudulent settlement, so that plaintiffs, as employees covered by the policies, claimed a right, in equity, to subrogation to the rights of the assured, and sought to hold the insurer. The claim was denied. The policy was on like conditions as those of the Travelers in the case before us, requiring, as a prerequisite to a right of recovery, payment by the assured. After pointing out the difference between the effect of a policy which insures directly against liability and one that insures against loss or damage by reason of liability, it is said, in the Finley case, (l.c.598): "Under the policies of the second kind, to which the one before us belongs, the amount of the insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy."

We do not think that these cases, and they are the only cases cited by learned counsel for the Frankfort Company, meet or cover the conditions of the policy of that company which is before us. The first and principal contracting clause is, that the Frankfort Company "does hereby agree to indemnify.....

Digitized by Google

the assured.....against loss arising from any legal liability for damages on account of bodily injury or death.....suffered by any person..... resulting from any and every accident.....happening in, or about the premises of the assured..... but the liability of the company in respect to any one person suffering injury or death shall in no case exceed the sum of $5000," etc. This is all there is to it. Not a suggestion can be drawn from any of this language that the payment is only to be made by the insurer in reimbursement of what the assured shall or may have paid. On the contrary, as we understand it, it is more in the nature of "a policy which insures directly against liability, and one that insures against loss or damage by reason of liability." [Finley v. Casualty Co., supra. See also Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 S. W. 504.] If it was the intention to pay only when and to the amount the assured had paid, a reference to clause 14 of the Travelers policy shows how easily that intention could have been expresed. The most that can be said for the Frankfort Company is that, failing to so write its policy, it has given one which is ambiguous and any ambiguity must be resolved against it. We conclude on this point, then, that it was not within the expressed intention of this policy issued by the Frankfort, that liability to make payment to the assured should fall in only after the assured had paid whatever damage may have been awarded to the injured party.

It would seem on careful reading of the 3rd and 4th warranty clauses, that the words "cost" and "costs" are used in a different sense in those clauses and that payment is not confined to mere taxable court costs, as that term is technically used. Thus in the third clause it is provided that, "if the company shall offer to pay to the assured the full amount for which the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal

Digitized by Google

proceedings nor be liable for any *costs or expenses* which the assured may incur in defending the same." Surely this means that if the claim is put in suit, and the company defends, the company will then be liable *for the costs and expenses* of the action. That is the reasonable construction, at least.

In the fourth clause it is provided that the company may undertake *"at its own cost"* the settlement of any claim, and the assured shall not "except at its own *cost,* settle any claim nor incur any *expense* without the consent of the company." Here again the terms "cost" and "expense" are used as inclusive. But grant that the meaning of the words "cost" and "costs" is ambiguous, as used, then, as before remarked, we are to apply the well-settled rule that the terms and conditions employed in a policy of insurance are to be construed, if ambiguous or of doubtful meaning, most strongly against the insurer. [Grocery Co. v. Fidelity & Guaranty Co., 130 Mo. App. 421, 110 S. W. 29; Rochester Mining Co. v. Maryland Casualty Co., 143 Mo. App. 555, 128 S. W. 204; Beile v. Travelers Protective Ass'n. 155 Mo. App. 629, 135 S. W. 497.] Construing the words "cost" and "costs," in the connection used, they have a much broader meaning than mere taxable court costs.

Construing this contract in its most favorable light in favor of the assured, and having in mind the dual meaning of the word costs, and mindful of the use of the word "expenses" and the contracts as to their payment, we come to a consideration of the question as to the liability of the Frankfort Company for payment, not only of the court costs but of interest accruing between the date of the judgment, as originally entered and the payment thereof, payment having been suspended pending the determination of the case by the Supreme Court.

It is provided by section 7181, Revised Statutes 1909, that interest shall be allowed on all moneys due

Digitized by Google

upon any judgment from the day of rendering the same until satisfaction be made by payment, at the rate of 6 per cent per annum, unless a higher rate is fixed by the contract, in which case interest shall be at the contract rate. "It is a general rule, that an action cannot be sustained for the interest of a demand after the principal has been paid; but this rule is only applicable where there had been no contract for the payment of interest. In such cases, interest could only be recovered as damages for the nonpayment of the principal debt, and therefore, where the debtor (creditor?) accepts the full amount agreed to be paid, without saying anything about interest, such payment is presumed to be in full satisfaction of the demand." [Stone v. Bennett, 8 Mo. 41, l. c. 43.] "Interest is a compensation for the use of money, for its detention." [Borders v. Barber, 81 Mo. 636, l. c. 646; McDonald v. Loewen, 145 Mo. App. 49, l. c. 59, 130 S. W. 52.] "Interest (on money) is the compensation which is paid by the borrower of money to the lender for its use, and generally by a debtor to his creditor in recompense for his detention of the debt." [4 Words & Phrases, 3706.] "Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." [Black's Law Dict. (2 Ed.), 647.] At common law, "interest is the legal damages or penalty for the unjust detention of money." [Madison County v. Bartlett, 2 Ills. 67.] "Interest is in the nature of damages for improperly withholding a debt, beyond the time when it ought to be paid." [Farmers' Bank v. Reynolds, 4 Rand. (Va.) 186.] Interest, therefore, when not awarded as a matter of contract, is given by law outside of the contract, when the contract has been breached. One promises to pay a fixed sum, at a definite time, on the happening of a named event. He does not promise to pay any larger sum; does not promise to pay interest. But if he fails to perform his contract, and is sued, he must pay, not only the

Digitized by Google

fixed sum, but interest on it, not by his contract, but by force of law by way of penalty for nonpayment in the amount and at the time when he should have paid it. If the debtor contests the claim, puts it in litigation, he has incurred, added, an obligation to pay interest as part of the price—part of the cost—of the litigation.

So it is here. The Frankfort Company undertook at its own cost and expense, unwilling to pay for any injury to one who fell within the protection of the contract, to litigate the cause, conduct the defense, and pay the costs of the litigation. That means the expense. That more than mere court costs is meant, is clear by the construction put upon it by the insurer itself, for as we have seen, it paid attorney's fees, printing, traveling and all other expenses connected with the defense of the case both in the circuit court and before the Supreme Court.

As we have before noted, it is said in Munro v. Maryland Casualty Co., (l. c. 706), that the authorities are conflicting as to the liability for interest when the interest added to the principal exceeds the maximum sum tendered, and that the divergent views are well stated in two cases, namely, Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co., 72 N. H. 485, and Connolly v. Bolster, 187 Mass. 266, and that in each case the policy involved was similar to that under consideration in the Munro case. As we have also noted, the policy in the latter corresponded to the policy in the Travelers case and contained the provision that no action should lie for any loss under the policy unless brought by the insured to reimburse him for loss actually sustained and paid by him in satisfaction of the judgment after trial of the issue, it being held that payment of the judgment was a condition precedent to liability on a policy, and the question of interest was not involved. The policy in Sanders v. Frankfort, etc., Ins. Co., was issued by the same company, appellant here, and is in the same form, with this very important

Digitized by Google

difference: in the policy before the Supreme Court of New Hampshire, the condition in clause 8 of the policy before the court was, "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Curiously, also the 7th clause in this same Frankfort Company's policy which was before the Supreme Court of Washington, in Puget Sound Improvement Co. v. Frankfort, etc., Ins. Co., supra, corresponds to this eighth clause in its policy which was involved in the Sanders case. No like clause or provision is in the Frankfort policy now before us or has been called to our attention, and we find none in the abstract of the record, which purports to set out the policies in full. Even with this eighth clause in the policy, however, it is held by the Supreme Court of New Hampshire that the insurer, if he elects to defend an action brought against the assured, is bound to protect the insured against liability at all stages of the litigation to the extent of the agreed indemnity, and he is not absolved from this obligation by the fact that the insured has not paid the amount of the judgment against him or is unable to do so by reason of insolvency, and it construes this 8th clause as applying solely to cases where the insurer denies liability for injuries which were made the subject of suit and refuses to defend.

In Rumford Falls Paper Co. v. Fidelity & Casualty Co., 92 Me. 574, the policy was limited to the payment of $1500 for the death of any one person. There it is held that the plaintiff, the assured, was entitled to recover in an action against the insurer the amount of the insurance specified in the policy, that is $1500, with interest thereon from the time when the verdict was rendered in the former action and the costs recovered in that action with interest thereon from the time when they were paid.

Digitized by Google

In Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, it is held that an employee having been injured while in the service of the assured and having recovered judgment thereon against the assured, the insurance company was liable upon an action against it, without the employer having first paid the judgment.

Possibly the most recent and certainly one of the most carefully considered opinions is that of Aetna Life Ins. Co. v. Bowling Green Gas Light Co., 150 Ky. 732. In that case it was held by the Court of Appeals of Kentucky, that where the contract of insurance stipulated that the insurer would pay a fixed sum of $5000 as indemnity to the assured, and in addition thereto would pay "the expense of litigation," if litigation was engaged in by its direction, the words "expense of litigation," include the costs of the suit incurred by the assured, the damages awarded the claimant on an appeal by the assured, and the interest that accrued on the judgment against the assured, the argument of the court being that as the insurance company has the right to compel the assured, against his will, to engage in litigation or else forfeit the right to any part of the indemnity he had contracted for, when it elects to burden the assured for the cost and expense of an action, the provisions of the policy should be liberally construed for his benefit.

In Saratoga Trap Rock Co. v. Standard Accident Insurance Co., 128 N. Y. Supp. 822, discussing the contract of insurance involved, it is said (l. c. 825): "The contract embraced in the policy which the defendant issued to the plaintiff is one of indemnity merely. It is not an agreement to save harmless or to pay when liability shall be established. If the first part of the agreement was not qualified by a subsequent clause, and if the only provision contained in the policy was that the insuring company would indemnify the assured against loss by reason of liability because of an accident happening to its servant, obligation to pay

Digitized by Google

would arise when judgment determining liability was entered against the insured (Stephens v. Pennsylvania Casualty Co., 135 Mich. 189, 97 N. W. 686), and whatever interest accrued in an ineffectual effort to get rid of the judgment the insuring company would be bound to pay. But the broad part of the agreement is qualified by a subsequent provision of the policy that no action shall lie against the company to recover for any loss upon the policy, unless it shall be brought by the assured for 'loss actually sustained and paid in money after actual trial of the issue.' This clause is a substantive part of the policy, and has the effect of changing the policy from one of indemnity when liability shall be established to one for indemnity for money paid out on the occurrence of a particular event, to-wit, payment of the judgment obtained because of such liability." That is a very clear illustration of the difference between the two policies before us. That of the Travelers does contain this limitation: that of the Frankfort which is before us, does not. It contains no clause providing for payment only in the amount and after the assured has paid.

In Brewster v. Empire State Surety Co., supra, following Saratoga Trap Rock Co. v. Standard Accident Ins. Co., supra, which latter rests mainly on Creem v. Fidelity & Casualty Co., 126 N. Y. Supp. 555, it is held that interest over the maximum amount cannot be recovered. But in all these cases, the insurer was only liable "for loss actually sustained and paid by him."

Our conclusion upon the consideration of all the cases, is that the better authority leads to the result that, under this form of policy issued by the Frankfort Company, the right of action of the assured did not depend upon judgment first being rendered against it and payment made by it thereof, but that its right to the indemnity accrued when the accident occurred for which it was liable; that the assured having turned over the defense of the action to the insurer and the

Digitized by Google

insurer having taken up the defense of it, it is liable for all the costs and expenses incurred in that action from the date the judgment against the assured was ordered to stand until its final payment; and that the fact that interest had accrued on that in excess of the maximum $5000, did not exempt the insurer from the payment of that interest. It follows from this that the trial court committed no error in giving the instruction in favor of the Travelers and in refusing the instruction asked by the Frankfort Company, nor in giving that under which the jury returned a verdict against that Company and in favor of the plaintiff.

In so holding we are not to be understood as holding that if the Frankfort policy before us contained the provision contained in the Travelers policy, there would be no liability for interest on the amount of a judgment rendered, accruing after judgment and before payment, that interest bringing the amount to be paid above the maximum. That question is not here before us and is not decided.

The judgment of the circuit court in this case is affirmed. *Nortoni* and *Allen, JJ.*, concur.

CENTURY REALTY COMPANY, Appellant, v. TRAVELERS INSURANCE COMPANY, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 5, 1913. Opinion Filed December 2, 1913.

Century Realty Company v. Frankfort Marine, Accident and Plate Glass Insurance Company, *ante*, followed.

Digitized by Google

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin,* Judge.

AFFIRMED.

Dawson & Garvin and *Leonard Wilcox* for appellant.

Watts, Gentry & Lee for respondent.

REYNOLDS, P. J.—The proposition involved in this case and its determination, rests upon the same facts and principles as those involved in Century Realty Co. v. Frankfort, etc., Insurance Company, *ante,* p. 123. For the reasons stated in the opinion in that case, the judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.,* concur.

CENTURY REALTY COMPANY, Appellant, v. FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted November 5, 1913. Opinion Filed December 2, 1913.

Century Realty Company v. Frankfort Marine, Accident and Plate Glass Insurance Company, *ante,* followed.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin,* Judge.

AFFIRMED.

Digitized by Google

Dawson & Garvin and *Leonard Wilcox* for appellant.

Seddon & Holland for respondent Frankfort Marine, Accident & Plate Glass Insurance Company.

Watts, Gentry & Lee for respondent Travelers Insurance Co.

REYNOLDS, P. J.—The proposition involved in this case and its determination, rests upon the same facts and principles as those involved in Century Realty Co. v. Frankfort, etc., Insurance Company, *ante*, p. 123. For the reasons stated in that case, the judgment of the circuit court is affirmed. *Nortoni*, and *Allen, JJ.*, concur.

ELIZABETH BONER, Respondent, v. CLARENCE M. NICHOLSON, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 4, 1913. Opinion Filed December 2, 1913.

PHYSICIANS AND SURGEONS: Malpractice: Sufficiency of Evidence. In an action against a surgeon for negligently closing a wound without removing therefrom a piece of gauze, after performing an operation on plaintiff, evidence *held* to establish that defendant gave plaintiff proper treatment, and hence it is *held* that plaintiff was not entitled to recover.

NORTONI, J., *dissents.*

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

REVERSED.

Watts, Gentry & Lee for appellant.

Collins, Barker & Britton, Casper M. Edwards and *C. K. Rowland* for respondent.

Digitized by Google

REYNOLDS, P. J.—Action by plaintiff, respondent here, against appellant, for damages. The petition in the case, after averring that plaintiff's husband had employed defendant, a physician and surgeon, to remove an abscess or tumor from plaintiff's abdomen and attend and care for her thereafter for compensation to be paid therefor, avers that defendant entered upon the employment but failed to use due and proper care or skill in the operation and care of plaintiff in this: "That defendant negligently and with gross negligence, unskillfully and unprofessionally closed the wound made by said operation without first removing therefrom a piece of cloth known as gauze, folded compactly and with a tape attached thereto, said gauze being approximately eight inches square; that by reason of defendant's gross negligence, plaintiff was compelled to undergo numerous operations known as probings, until on or about the 21st day of October, 1909, when said gauze was removed by a final operation." Averring that plaintiff was confined to her room and bed for approximately five months and put to additional expense for physicians, surgeons and medicines in the sum of $800, and caused to suffer great bodily pain and mental anguish, and that she is now and will continue for a great period of time so to suffer, $10,000 are demanded as compensatory and $10,000 as punitive damages, with costs.

The answer was a general denial; the trial before the court and a jury.

At the close of the evidence in the case for plaintiff, defendant interposed a demurrer, which was overruled. Thereafter he introduced his testimony, and all of the evidence being in, defendant again interposed a demurrer, which was overruled and, the court instructing the jury, a verdict was returned in favor of plaintiff in the sum of $1000. Filing a motion for new trial and excepting to that being overruled, defendant duly perfected his appeal to this court.

Digitized by Google

The learned counsel for appellant make seven assignments of error. First, to the action of the court in overruling the demurrer to the evidence. Second, to the admission of improper evidence. Third, the allowance of improper questions by plaintiff's counsel which suggested that defendant was insured against liability in actions for damages. Fourth, to the overruling of motions made by defendant to discharge the jury and continue the cause because of these improper questions. Fifth, to the exclusion of evidence offered by defendant. Sixth, the making of improper remarks and the asking of improper questions by the trial court. Seventh, the giving of improper instructions by the court at plaintiff's request. In the view we take of the case, it is only necessary to consider the first of these assignments. We hold, on the testimony of plaintiff herself, and on the petition in the case, that the demurrers should have been given. We might rest on plaintiff's own evidence, for her case was in no manner helped out by that of the defendant. In point of fact, the evidence for defendant showed that his treatment of the case while in his hands was highly skillful, and very successful.

First, as to the petition, the negligence charged is "that *defendant* negligently and with gross negligence, unskillfully and unprofessionally *closed* the wound made by said operation, without first removing therefrom" a piece of gauze, etc. We have italicized the words, "defendant" and "closed." They are not only very significant, but controlling. It is not charged that Nature closed the wound; not charged that in the ordinary course of things the wound became closed; it is distinctly and specifically charged that defendant closed the wound, without first removing the gauze from it, and that this was negligence. To paraphrase it, that this sponge was put into the wound when the surgical operation was first performed and that with this sponge in the wound, "defendant negligently and

Digitized by Google

with gross negligence, unskillfully and unprofessionally closed the wound." That is the charge, gathered not only from the petition but from the testimony of plaintiff, and the theory upon which her counsel tried the case.

Turning to the testimony given by plaintiff herself, it appears that, living at Malden, this State, suffering from an abscess or tumor which had formed in her abdomen, her family physician insisted on her going to St. Louis for treatment, that physician recommending that she place herself under the care of defendant, who was at the time chief surgeon of the Rebekah Hospital in St. Louis. Accompanied by her husband and family physican, she went to St. Louis on the 27th of May, 1909, going directly to the hospital, and placed herself in charge of defendant for the operation. She was operated upon the next day, May 28th. Without going into detail, it is sufficient to say that a large gash, six, eight or ten inches long was cut in her abdomen. The operation—designated laparotomy—was performed by defendant, assisted by another surgeon and one or more nurses. During this operation plaintiff was under the influence of an anaesthetic. That, says plaintiff, was the only time while she was at the hospital, that, so far as she knew, she was under the influence of an anaesthetic.

Plaintiff testifies that she knew nothing of the operation itself, as she was unconscious while it was being performed; that she regained consciousness about half past four o'clock on the afternoon of the 28th of May, and found her husband and Dr. Mitchell sitting in the room, with others, possibly, but not defendant. It would seem, from what plaintiff testified to as occurring afterward, that when the operation was performed, the opening was packed with gauze strips or sponges, as they are called, the edges of the cut sewed together and a bandage put around her body to hold the dressing in place. That condition remained until

Digitized by Google

the ninth day after the operation had been performed. On this ninth day, says plaintiff, and we here follow her testimony, placing in quotation marks portions of it just as she gave it, the bandage was undone and the stitches and packing taken out. She then for the first time saw the wound, which, she says, had not been opened between the day of the operation and this ninth day. When the packing was taken out on this ninth day, the wound was washed out and strips of packing, of gauze—plaintiff indicating the length by her hands —put "up and down the gash." The first time this dressing occurred the gash had come open after the stitches had been removed, and Dr. Axline, the surgeon who acted as assistant to defendant in handling the case, "taken strips of adhesive, the nurse held that together, and Dr. Axline put strips of adhesive over it to keep it from coming further apart," that is, put this adhesive plaster on the outside, and "then he would take strips of gauze with an instrument about that long (indicating) he had, and slip it under that adhesive and fill up that place." The gauze was in long strips, plaintiff indicating the size.

Plaintiff continues: "They would get that just about full, then they would take pieces of gauze doubled backwards and forwards, they put a great pile of that over the place, and then put cotton on and bandaged me up. . . . I was dressed every day while I was there after they taken the stitches out." The treatment continued in the hospital until August 20th. Asked by her counsel whether during that time the wound was getting smaller all the time, she said it was, so that on the 20th of August, "it had very near closed up, only where the drain tube was, they had a drain tube in there." This drain tube apparently emptied through the vagina, "and," says plaintiff, "every morning whenever they would dress that place they would have to draw them drain tubes out; it was very painful." That was done every morning while plain-

Digitized by Google

tiff was at the hospital, the drain tube not being dispensed with until a week before she left the hospital. In the meantime they continued to dress the wound, which kept getting smaller every day, until, when plaintiff finally left the hospital, as she says, the wound in her abdomen was not larger than the end of her thumb. Plaintiff said that at the last they were not putting any more gauze in the wound—"I don't know how long they hadn't used no gauze, only just enough for covering, just put in a big, wide piece, as wide as your hand." That was put right over the wound, on the outside, next to the flesh. They gradually kept putting in less gauze. Asked up to what time they had quit putting in gauze, plaintiff said: "I don't know how long before I left there, that had healed up only where the tube was; of course they couldn't put no gauze there, only just to lay it over there;" knows they started in on that sort of treatment on the ninth day after she had been in the hospital and that they quit before she went home. Asked if she remembered about when they put the last gauze in the wound, plaintiff said she did not; did not remember about what time between the nine days and before she left the hospital it was that the wound became so small that they could not, or did not, put in any more gauze. Plaintiff said what she did know was, that a week before she left the hospital, the wound was healed up to the size of the end of her thumb. When plaintiff was about to leave the hospital defendant gave her no instructions about herself nor about the wound, nor did he tell her whether or not there was a piece of gauze left in her abdomen; said nothing about her condition one way or the other.

This is practically all of the testimony in chief of the plaintiff touching her treatment in the hospital. As to what occurred afterwards, it is sufficient now to say that when plaintiff reached home about the 21st of August, she again placed herself under the care of her

Digitized by Google

own physician, Dr. Mitchell. On October 21st, 1909, he found a tape protruding from the opening in the wound and pulling on it brought out a piece of gauze, called a sponge. That "sponge" was in evidence and it is described as a piece of gauze, rolled into a cylindrical shape, about six or eight inches long and about an inch and a quarter in diameter, with a tape some four inches long attached to one end. It was rolled up in its present shape to get it out; originally, it is claimed, it was flat but was rolled into its present shape in extracting it.

On cross-examination plaintiff repeated that she first saw the wound when the dressing was removed on the ninth day after the operation had been performed; was lying flat on her back, but by elevating her head slightly and looking along down the line of her body, she could see into her abdomen. The gash was a long one, could see a cavity in the abdomen "about as big around as the top of a medium size teacup. It didn't look deep when I saw it." Asked, "You couldn't see the bottom of it, could you?" plaintiff answered, "I saw my bowels after they taken the packing out." This follows: "Ques. Now, from time to time they dressed it and you didn't attempt to count the sponges they put in or took out? Ans. They never put no sponges in. Ques. Never did? Ans. No, sir; not after they taken the stitches out; they put in long pieces of gauze, longer than my arm, never put no sponges in there. Ques. How could you tell? Ans. I could see whenever they would lay them in there a piece at a time. Ques. Did you attempt to count every piece that they put in every day? Ans. No, I didn't . . . Ques. You left it to the doctors to decide what to put in and what to take out? Ans. They put in and taken out what they wanted to, but didn't take out nary sponge. Ques. How did you know, weren't their arms between your eyes and the opening when they were dressing?

Digitized by Google

Ans. No, sir; Dr. Axline stood on this side and dressed it (indicating). Ques. Didn't he have his arm between your eyes and the wound? Ans. When he would take up a piece of gauze to put in there he would take it out of the pan that had medicine in it, raise it up long, lay it down there back and forth. Ques. They also put in a drainage tube? Ans. That was done when I didn't know nothing about it; . . . knew it was there. Ques. When they took that (the drainage tube) out, could you not see whether they put anything in place of it. Ans. No, sir; they never put nothing in there when they taken the drainage tube out. Ques. You never did see anybody put in that piece of gauze that finally came out? Ans. No, sir, I didn't; I seen Dr. Mitchell take it out;" did not see anybody put it in, and does not know who put it in, says plaintiff in answer to questions. To resume: "Ques. . . . Now when they treated you from time to time, as the treatment progressed, this long cut, eight or ten inches long in the skin, gradually healed, didn't it? Ans. Yes, sir. Ques. You could notice each day it had healed a little bit more than it had the day before? Ans. Some days it looked like it was healing all right; looked to me that way, but the doctor would take an instrument and rip it loose where it had healed at the top, it seemed like he didn't want it to heal up; that is what I thought. Ques. That is what he said, he didn't want it to heal up? Ans. Yes, sir. Ques. And you knew all the time from the course of that treatment what they were trying to accomplish was to prevent the wound from closing on the outside of the abdomen until it had closed on the inside? Ans. Yes, sir. . . . Ques. You saw from the way they were ripping it loose from the outside they were trying to keep it from healing on the outside first? Ans. Yes, sir. Ques. You also saw they were packing stuff inside? Ans.

Digitized by Google

Yes, sir; just laying it along in the gash, that was all the place they packed."

Plaintiff repeated that when she left the hospital, the opening in the skin had been reduced to about the size of her thumb and the cut had all healed but that; that the last treatment given her at the hospital was the evening of the 20th of August. On the evening of that day, the assistant to defendant, who was then attending her, "washed the wound all out good, washed it off good, and put a piece of gauze over it, put new cotton on it, and got adhesive and put a bandage plumb from one side to the other just as tight as he could draw it," around her body; used a syringe with liquid in it to clean out the wound, inserting the end of the syringe into the wound to about the depth of half of her litle finger. Continuing, plaintiff was asked: "Ques. Now you don't know when was the last day that any gauze was put into the wound? Ans. How is that? Ques. You don't know when was the last day that any gauze was put into the wound? Ans. No, sir. Ques. You stated on your direct examination you didn't know when the last time was they put gauze in there? Ans. No, sir; I don't; it had been healed up quite a while before I left the hospital, all only that opening." Plaintiff further testified that after she went home she suffered greatly; her physician treated the wound, opened the edges when it closed and "washed out this place here in my side where the opening was, and he put in his medicine—I don't know what kind of medicine he used, but the treatment was a good deal the same as Dr. Nicholson's." The wound was still open and running. That continued, she says, not only until October 21st, but until February 3, 1910. On the 21st of October, 1909, Dr. Mitchell pulled out the piece of gauze offered in evidence and she was greatly relieved, going about her work in about two weeks. The secretion of pus, however, continued, discharges occurring. The wound in the skin had healed

Digitized by Google

up twice between then and January, but it would break out again and run, meaning by that, as she said, it would come open again. Plaintiff was then asked: How soon after the sponge was taken out was it that the wound healed completely? Ans. Why, it never healed entirely up for I guess eight weeks;" did not stay healed but a few days and broke open of its own accord, watery looking matter being discharged from it which was very offensive. Dr. Mitchell would take a probe, run it into the wound and burn or cauterize it; that was before he removed the gauze; after the gauze had been removed about eight weeks the skin healed but it broke open again, and Dr. Mitchell again cleansed it and it would heal over again in a few days and remain that way for about a week before it would break open again. Between October and January it healed up and broke open twice, then healed up the third time and a large break, discharging watery matter, occurred. Dr. Mitchell again cauterized it and it gave her no more trouble. It finally healed the 3rd of February.

On redirect examination plaintiff testified that she had never been operated on surgically before the time when defendant operated. There was no wound or cut in her body until the day he operated. Continuing, her counsel asked her: "Ques. And you saw all the gauze that went into there after that. Ans. Yes, sir. Ques. And such a sponge as this did not go into that wound? Ans. Did not; no, sir." Question by the court: "What is that?" Mr. Barker, counsel for plaintiff: "She doesn't know what happened on the date of the operation; she was never operated on before; her wound wasn't opened until nine days afterwards; she saw it opened every time after that and after that no such sponge as this was inserted in that wound." By the Court: "Ques. Did Dr. Mitchell, after you returned to your home, ever take out any gauze prior to this day you speak of? Ans. No, sir;

Digitized by Google

that is the only piece of gauze taken out. Ques. He never put in any gauze? Ans. No, sir." By Mr. Barker: "Ques. You didn't know this gauze was in there? Ans. No, sir; but I did know when it came out."

This is substantially all the testimony of plaintiff as to her treatment in the hospital by defendant, and after she went home and was again in the hands of Dr. Mitchell, her local physician. Testimony of nonprofessional witnesses was given as to the extent of her suffering which is not necessary to reproduce. A physician and surgeon was introduced by plaintiff as an expert, who was asked this hypothetical question: "Assuming, doctor, that laparotomy has been performed upon a woman, do you consider the leaving of a sponge such as you have described and such as has just been exhibited to you, in the abdominal cavity for a period of say about one hundred and fifty-six days, proper or skillful treatment?" He answered, "No." Before this hypothetical question for plaintiff finally assumed this form, counsel for defendant objected and excepted to the period being placed at one hundred and fifty-six days, on the ground that defendant was not responsible except for the period while plaintiff was in his care, that is from the 27th of May to the 21st of August, and objected and excepted to the period between the 21st of August and the 21st of October being included, the contention of counsel for defendant being that defendant was responsible, if at all, for only about eighty or eighty-five days, namely, from May 27th to August 21st, and not for one hundred and fifty-six days. On final cross-examination of this same physician a long hypothetical question assuming to cover and, as we find, covering all of the testimony which had been given in the case with reference to the treatment of plaintiff, was put to that same surgeon by counsel for defendant, the conclusion of the question being "whether in his opinion as a surgeon and expert the treatment de-

Digitized by Google

scribed for the condition described was proper surgical treatment or not," to which he answered, that it was, and that it was such treatment as is adopted by the leading surgeons of the world.

The family physician, Dr. Mitchell, was not put on the stand or examined as a witness by plaintiff but by defendant, and save the physician first above referred to, no expert witnesses were placed upon the stand by plaintiff.

Referring to the testimony and to the petition, we are forced to the conclusion that plaintiff's own testimony fails to make out her case. That case must turn in the first place, on plaintiff having established by substantial evidence, that this sponge, removed October 21st, had been put into the wound in May and closed up in the wound by defendant at that time; that defendant had then "negligently and with gross negligence unskillfully and unprofessionally closed the wound made by said operation without first removing therefrom a piece of cloth known as gauze, folded compactly and with a tape attached thereto," known surgically as a sponge.

That was the theory upon which the case was tried by plaintiff. In support of this, it was further sought to show that the particular sponge or piece of gauze had been pushed in or became lodged between the intestines and a fatty apron or wall which lies between the intestines and abdominal cavity, or had been inclosed in another and larger piece of gauze, and that it had never been discovered or removed until on October 21st, when Dr. Mitchell, taking hold of the tape attached to it, had drawn it out. It is claimed that to do this was negligence, was an unskillful, negligent and unprofessional act. There is not a scintilla of evidence, even considering that of plaintiff herself, that sustains either of these ideas. The idea that this sponge was inclosed in another and larger one, is a mere supposition, resting on no testimony whatever. That it may have been

Digitized by Google

lodged outside of the wall or curtain of the intestines, describing the situation and not using technical terms, is not only unsupported, but is founded on disregard of natural laws.

Probably the best way to present the situation is to follow the explanation of the operation and of the internal structure of the abdomen as given by defendant; as to this latter he is uncontradicted, and supported in his statement of the operation by those present who saw it. He testified that after removing certain parts and matter from the abdomen, there was left a cavity larger than plaintiff's head, and she was a large woman; this cavity was separated from the intestines, the intestines walled off from it, by a wall of lymph, which Nature had thrown out—"a wall of lymph, which effectually separated the abscess cavity from the intestinal cavity. In other words, the intestines are contained in the abdominal cavity. This abscess had formed, lymph had been thrown out. Gradually the lower cavity had enlarged and had shoved the intestines up. There was a perfect wall, or seemed to be, between the abscess cavity and the intestines. After removing an ovary and other organs, and freeing the abdomen of the great mass of pus, defendant packed the cavity with sponges and gauze, stitched the edges of the cut, covered it with adhesive plaster, closed it, and wrapped a bandage around the body. The testimony of plaintiff is that she was unconscious when all this was done, but when she regained consciousness she found herself so bound up and when, on the ninth day, the dressing was removed, she saw the stitches taken out and the gauze removed and then replaced. She insists that she never saw any "sponge", such as produced, put in at any time. Therefore, according to her idea, it must have been put in at the first operation and when the cut and cavity were first treated and packed, and that is the only time "defendant closed the wound." Plaintiff says that she saw

Digitized by Google

the opening, the cavity, cleaned out until it was empty, so empty that she saw her own bowels. So she has shown that there was no sponge or gauze in sight in the wound or cavity. Then, and to meet this, his own client's testimony, the skillful counsel for plaintiff evolves the two ideas, call them theories, above given. That the first, a concealing of this sponge in a larger piece of gauze and accidentally leaving it in the wound or cavity, is untenable, is clear, even according to plaintiff's own testimony. She saw into the cavity and it was empty. That it had been pushed beyond the cavity, outside of the wall or curtain and became lodged in and was concealed by the fatty lining, wall or curtain, is supported by no testimony whatever and would be against the laws of Nature, the patient having survived. If it had been pushed or had penetrated through this wall, that it would have caused peritonitis and death, is the uncontradicted testimony of all the witnesses who were examined on this point. Defendant himself knew this. Asked if he had done anything toward preserving that wall, or if he had tried to break it down, he answered that he tried to use every care not to break it down; that if he had broken it down by shoving a sponge through, plaintiff probably would have died in a few hours of peritonitis; that the pus would have gone into the general peritoneal cavity and peritonitis and death would have followed. Defendant further testified that some twelve or fourteen days after the operation, he had personally taken out every vestige of gauze, irrespective of its form, whether in sponges or not, that was either on the abdomen or within the cavity, and cleaned out the abscess cavity thoroughly and repacked it with gauze sponges. That he did clean out this cavity is admitted by the plaintiff herself, for she says that she saw her own bowels. Of course, if this sponge was concealed by the fatty wall, as counsel contends, plaintiff could not

Digitized by Google

have seen it; but if that had been its position, says defendant, peritonitis and death would have followed. So that on natural laws, it is impossible to hold that it could have been so concealed. Describing the gauze sponges and that each had a tape, defendant testified that he had removed all of them, "not maybe or probably, but positively, no gauze which was in that abdomen could have been tangled up with anything;" knows he got all the packing out. Of course, the jury were not bound to believe this testimony of defendant, but whether they believed it or not, plaintiff has not brought forward an iota of testimony from which the contrary can be inferred. Her testimony, as we have seen, tends to confirm it. She does not pretend to know what was put in when the wound was first dressed and closed; her idea is that this sponge was then put in and never removed until in October. Her case must depend on establishing this proposition, for if this sponge was put in after May, after defendant had closed the wound, plaintiff's case falls. The hypothetical question put by plaintiff rests on the presence of the sponge for 156 days, a period that can only be found by going back to May 28th, and even then until October 21st was but 143 days. It was on the theory that this sponge had been there from May 28th to October 21st, that counsel for plaintiff also cross-examined the expert witnesses produced by defendant. In short, plaintiff's whole case as pleaded and as tried, rested on the fact that this sponge was placed in the cavity on May 28th, when "the defendant closed the wound." There is not only an entire absence of proof of this, looking to the testimony of plaintiff herself, and she was the only witness on her side of the case who gave any testimony that can be held to bear on this point, but there is not a particle of evidence from which it can be inferred that it was negligent, unskillful or unprofessional to them close the wound with the sponge left in and that is the sole averment of negli-

Digitized by Google

gence. On the contrary, making the incision, filling the cavity and cut with gauze, with "sponges," and then closing the wound with them in place was the very thing to do, and the only proper treatment, and there is not a scintilla of evidence even tending to show that this was done carelessly or negligently. The burden was on plaintiff to prove that as the crucial fact in her case. She has failed in this.

It is hardly necessary to call attention to the fact that the petition has no reference to a natural closing of the wound; it refers to the closing of it by defendant. That it was not closed by Nature until long after plaintiff left the care of defendant, is proved by her own testimony.

Giving the most careful consideration of the evidence for plaintiff, giving her own testimony every possible weight, we are compelled to hold that there is no evidence in the case from which the jury had any right to infer that, even assuming that this sponge or piece of gauze was put in in May, that the wound was then carelessly, negligently and unprofessionally closed by the defendant. Nor is there any substantial evidence that any sponge then placed in the wound remained in it from then until the 21st of October. The most that can be said of plaintiff's testimony is that it shows that she did not know when this particular sponge was put in. Hence there is no substantial evidence that any of the gauze or sponges placed in the wound by defendant in May, remained until October, or that the gauze taken out in October had been put in on May 28th. That there was gauze or a surgical sponge in the wound when plaintiff left the care of defendant, is practically admitted ty defendant himself in a letter which he wrote and which is in evidence. But this is far from an admission that it had been there ever since May, nor is it any admission of respon-

Digitized by Google

sibility of defendant for its continuance in the wound until October.

Another phase of the case relates to the sponge having been left in the wound after plaintiff went from under the care of defendant and until its removal in October by Dr. Mitchell, her family physician. While there is no charge in the petition of negligence in leaving this sponge in the wound until October, the case was tried on the theory that it had been placed in the wound in May and left there until October, and that this was negligence for which defendant is responsible. Counsel for defendant, by his position at the trial, seems to have conceded that a question of negligence in leaving the sponge in, is in the case. It was tried on that theory, even though no such issue is tendered by the pleadings. But while conceding that this was in issue, that counsel insisted that defendant could only be charged for negligence in leaving the sponge in the wound down to the time plaintiff left the care of defendant. That was in August. Without passing upon this, we turn to the more important questions as to whether there is any causal connection between plaintiff's suffering and the presence of this sponge, and whether it was improper, careless and negligent, to leave it there when plaintiff left the hospital. The surgeon placed on the stand by plaintiff as an expert, positively refused to say that a sponge left in a wound of the character described, from May to October, would be responsible for the subsequent suffering or condition of the plaintiff. The most that he would say was that its effect would be problematical; that the proper length of time it should be left in would depend on conditions and the purpose for which it had been left in the wound; that they were often left in for several days. Asked if "several days" was the limit, he answered: "No, not the limit. As I said a while ago, it might be in some cases you would have some other object in keeping one certain

Digitized by Google

gauze in there, for instance if you are afraid to take it out on account of the position it is in, because you know you can't get it back there again, because you have got it in there for a purpose and you can't get another one back there, therefore your wound is suppurating anyway, it won't do any additional harm."

Dr. Mitchell, who again took charge of the case after plaintiff returned from the hospital, testifies that the wound was then open, the opening about two and a half inches long and an inch and a half wide, and a "seropurulent secretion coming out of it," a discharge of pus. The wound remained open; as it would tend to heal up he destroyed the fine tissue formed at the outer edges with nitrate of silver in order to keep the wound open.

It appears from the testimony of Dr. Mitchell that on October 21st, when he removed the outer gauze, he found the tape of the sponge exposed and, taking hold of the tape with a pair of light steel tweezers, he pulled out the sponge. He testifies that when he found this sponge had been forced up toward the outer edge of the wound, he felt that the lower cavity was gradually healing and that this operation had forced the sponge to the surface. After taking out the sponge he put in a small drain, but the surface was healing so rapidly that it pushed this drain out and he had to use the nitrate to keep it open. Another abscess formed in a short time and the matter had worked itself through the original opening, discharging quite a large amount of pus. Again an abscess formed and the wound again reopened. This was some time after the sponge had been removed. This occurred several times until about February, when the wound healed.

So it is clear that from this evidence, and there was none to the contrary, the presence of the sponge had nothing to do with the formation of these abscesses, for Dr. Mitchell testifies that the suffering plaintiff went through was almost the same after the removal

Digitized by Google

of the sponge as before that. Asked if, from his observation of the case, as he treated plaintiff from August 21st to October 21st, when he removed the sponge, in his opinion the presence of the sponge had been beneficial or detrimental, he answered that it was beneficial, "because, if the sponge hadn't been in her it would have then healed up; I couldn't have kept it open." Asked if he had known that the sponge was in the wound when he took charge of plaintiff, whether he would have removed it, he answered that he would not.

It will be seen that the expert called by plaintiff refused to testify that the presence of the sponge was hurtful or leaving it there showed negligence. In fact there was no evidence whatever, no witness testified that the presence of the sponge had been injurious.

For these reasons we are compelled to hold that the judgment of the circuit court in overruling the demurrers was erroneous.

In this view of the case we do not consider it necessary to take up other assignments further than we have done. The judgment of the circuit court is reversed. *Allen, J.*, concurs. *Nortoni, J.*, dissents.

ST. LOUIS SANITARY COMPANY, Respondent, v. WILLIAM F. REED, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 6, 1913. Opinion Filed December 2, 1913.

1. **PLEADING: Demurrer: Waiver by Pleading Over.** Where a demurrer to a petition is overruled and defendant answers over, it is not necessary for the appellate court to notice the ruling on the demurrer.

2. **MONEY HAD AND RECEIVED: Nature of Remedy.** An action for money had and received lies for money which, *ex aequo et*

Digitized by Google

bono, defendant ought to refund, for money paid by mistake, or got through imposition, express or implied, or through an undue advantage taken of plaintiff's situation, contrary to laws made for the protection of persons, under the circumstances.

3. ———: **Favored Remedy.** An action for money had and received is favored in this State.

4. ———: **Pleading: Necessary Averments.** The petition, in an action for money had and received, unless on an account, must usually be special, setting forth the relation of the parties and the contract or wrong by means of which the money was received; and hence the petition, in an action to recover money which defendant claimed was paid him by plaintiff for services, should set out the relation of the parties and the contract or wrong out of which the right of action arose.

5. ———: ———: **Omission of Essential Averments: Remedy.** The failure of the petition, in an action for money had and received, to set out the relation of the parties and the contract or the wrong out of which the cause of action arose can be reached by a motion to make it more definite and certain, if not by demurrer.

6. ———: **Pleading: Burden of Proof.** In an action for money had and received by defendant to plaintiff's use, where the answer, after denying each and every allegation of the petition not admitted, denied that defendant was indebted to plaintiff in the sum sued for, or any other sum, and admitted that, on the dates alleged, defendant received of plaintiff the sums set out, aggregating the amount sued for, and alleged that said sums were paid defendant as his compensation for services rendered plaintiff, and were not received on any other account whatsoever, it was error for the court to hold that the burden of proof was, at the outset, under the pleadings, upon defendant; this ruling losing sight of the distinction between burden of proof and preponderance of evidence.

7. **CORPORATIONS: Relation of Directors to Stockholders.** Corporations are, in a way, partnerships; and their directors are more than mere agents for fellow stockholders, they being trustees for fellow stockholders, in charge of a trust fund.

8. ———: **Liability on Quantum Meruit.** As concerns directors, the acts of a corporation may be proved in the same manner as the acts of individuals, and a promise to pay the reasonable value of services rendered and accepted may be implied against corporations as against individuals.

9. ———: **Right of Employee to Compensation: Quantum Meruit.** One who, though he was at one time titular secretary and

Digitized by Google

treasurer of a corporation, was neither a director nor a stockholder, but was merely a hired employee, could recover the reasonable value of his services, if rendered at the request, by the direction, or with the knowledge, of the company's officers, directors, or managers, and accepted by them, and not voluntarily rendered without expectation of reward, notwithstanding a resolution of the board of directors that all salaries should end with the end of the current year, since the rule that officers and directors of corporations may not charge for services, unless founded on a resolution of the board or provided for in the articles, constitution, or by-laws, does not apply to one who is neither a director nor stockholder; and hence, although the introduction of such resolution in evidence, in an action against the corporation for the reasonable value of his services, *prima facie* deprived him of any claim to compensation, he should have been permitted to show that he was not included in it, but that he did the work with the consent, on the employment, and with the knowledge, of the company's officers and directors.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen,* Judge.

REVERSED AND REMANDED.

Morton Jourdan for appellant.

(1) Corporations, like individuals, are liable in actions *quantum meruit* for the reasonable value of services rendered. 21 Am. & Eng. Ency. of Law (2 Ed.), p. 907. (2) A person who is elected, and acts as secretary of a corporation, and is neither a director nor a stockholder, is entitled to recover the reasonable value of his services as such; although there is no resolution fixing his salary, and although the corporation never agreed to pay him anything. 2 Cook on Corp., sec. 657, page 1937; 21 Am. & Eng. Ency. of Law (2 Ed.), pp. 905-6; Smith v. Railroad, 102 N. Y. 190; Railroad v. Richards, 8 Kan. 101; Bldg. Assn. v. Hegan, 49 S. W. 796; Dodge v. Traction Co., 115 N. W. 1004; Greenleaf v. Railroad, 91 N. C. 33; Railroad v. Owen, 121 Ala. 505; In re Dale, 61 L. T. Rep. 206. (3) That the services were rendered at the request

Digitized by Google

of the corporation raises an implied obligation that the corporation intended to pay for same. This implication can only be rebutted by clear evidence that the services were intended to be gratuitous, and the burden of establishing this defense is upon the corporation. Smith v. Railroad Co., 102 N. Y. 190.

Chester H. Krum for respondent.

(1) In the absence of a by-law or resolution of the board of directors legally and regularly passed, providing for the payment of salaries to the officers of a corporation, they are presumed to serve without compensation. There was no by-law or resolution covering the period of misappropriation by the appellant and hence a recovery could not be avoided. Remmers v. Sekey, 70 Mo. App. 364. (2) The resolution, withdrawing all salaries, afforded full ground for the recovery had anything been needed in that direction.

REYNOLDS, P. J.—The petition, after averring the incorporation of the plaintiff, charges "that the defendant is justly indebted to the plaintiff in the sum of $1600 for so much money had and received to the use of the plaintiff between May 1, 1907, and May 1, 1910, to-wit. . . ." Here follows an itemized statement charging fifty dollars as received May 1, 1907, and on the first day of each succeeding month to and including December 1, 1909. The petition continues: "That payment of the said sums and the said aggregate sum of $1600 received as aforesaid by the defendant to the plaintiff, has been duly demanded of defendant by the plaintiff and by him refused." Judgment is demanded for that sum and costs.

A demurrer was interposed to this and overruled. As defendant answered over, it is not necessary to notice this. The answer, after denying each and every allegation of the petition, "except such as are hereinafter admitted," denies that defendant is indebted to

Digitized by Google

plaintiff in the sum of sixteen hundred dollars or in any other sum whatever. It admits that on the dates alleged, defendant did receive of plaintiff the sum therein set out, agregating $1600, "which said moneys were paid him by the plaintiff, and received by the defendant, as his compensation for services rendered to the plaintiff, at its instance and request, during the time and period aforesaid, as secretary and treasurer of said plaintiff corporation; and that said sums and compensation were reasonable for the services rendered; and that said sums were not received on any other account whatsoever."

There was a reply which denies that the moneys mentioned in the petition and answer were moneys paid defendant by plaintiff, and "denies that they were received by the defendant as his compensation for services rendered to plaintiff at any time either as secretary or in any other capacity. It alleges that the said moneys were received and had by the defendant as alleged in the petition."

Trial to the court, a jury having been waived. At the outset, counsel for plaintiff asked the court to rule that the burden of proof was on defendant under the pleadings. The court so ruled, defendant excepting.

Thereupon defendant offered himself as a witness and testified that he had been secretary and treasurer of plaintiff corporation from April, 1905. He was such by appointment of the board, but was not a member of its board of directors nor a stockholder in the company. He testified that when he turned over the books and papers and money of plaintiff, after December 31, 1908, he accounted for and paid over to his successor all moneys in his possession other than the $1600 here involved. Counsel for defendant offered to introduce evidence tending to prove the reasonable value of the services defendant had performed for the plaintiff for the period covered, and that the $1600 defendant had retained, had been retained with the ap-

Digitized by Google

proval and consent of the president of the company, and was on account of services he had rendered as secretary and treasurer of the plaintiff corporation while its business and affairs were being wound up. This line of testimony was all objected to and excluded on objection of plaintiff's counsel, defendant duly excepting.

On cross-examination counsel for plaintiff, identifying the books of the corporation, read from the minutes of the proceedings of the board this: "Special meeting of the board of directors duly called, held April 25, 1905; present, Messrs. Campbell, Garnett and President Blakely. The minutes of the last meeting were read and approved. . . . Ordered that the superintendent's salary be reduced one-half; that the secretary be laid off and that the treasurer be empowered to act as secretary his salary for the two offices being fixed for the present at $100 per month." Defendant testified that he had been elected treasurer on the 24th of March, 1904; that at that time his salary as treasurer commenced April 1, 1904, and was fixed at $1500. He also identified an entry in the minutes as in the handwriting of the president, who had signed the minutes, the entry of date Nov. 16, 1906: "It was ordered also that salaries end with the end of the present year, as well as all other expenses that can be controlled." Asked if he was present at that meeting, witness said he was not.

On redirect examination, the witness was asked by his counsel, if, after the date of that meeting, he had continued to discharge his duties as secretary and treasurer of the company, up to January 1, 1909. He answered that he had; "the same afterwards as before," and that during that period he had the custody of the books and papers and moneys of the company. He had been paid his salary at the rate of $100 a month up to the 1st of January, 1907. Asked what compensation he had been paid after the 1st of Jan-

Digitized by Google

uary, 1907, and prior to May 1, 1907, objection was made on the ground that it assumed compensation had been paid. Objection sustained, counsel excepting. He was then asked if, after the 1st of January, 1907, the directors of the company knew he was continuing the services as secretary and treasurer of the company as before. He answered that they did. Asked if he continued to render those services from January 1, 1907, to January 1, 1909, with the knowledge and consent and approval of the directors of that corporation, he answered, "Yes." This was objected to after the answer had been made and the objection sustained. Finally defendant was asked on what account and for what reason he had retained the $1600 when he turned over the books and papers and moneys of the corporation to his successor in office. This was objected to, objection sustained and counsel duly excepted.

At the conclusion of the hearing and having taken the cause under advisement, the court made a finding and rendered judgment in favor of plaintiff for the amount sued for with interest. From this, interposing a motion for new trial as well as one in arrest of judgment and excepting to these motions being overruled, defendant duly perfected his appeal to this court.

This judgment and the rulings of the trial court, hereinafter referred to, cannot be sustained.

It was error to hold that the burthen of proof was on defendant. The petition undertakes to state an action for money had and received, a form of action of which it has been said by Lord MANSFIELD in the often quoted case of Moses v. Macferlan, 2 Burr. 1005, "for money which *ex aequo et bono,* the defendant ought to refund: . . . It lies for money paid by mistake; . . . or for money got through imposition (express, or implied); . . . or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons

Digitized by Google

under those circumstances." It is a form of action favored in our State, as see Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, l. c. 288, 94 S. W. 527. We have discussed this form of action in Garnett & Allen Paper Co. v. Midland Publishing Co., 156 Mo. App. 187, 136 S. W. 736, and need not go into it fully here.

It is said in Abbott's Trial Evidence (2 Ed.), p. 335, that, "The complaint, unless on an account, must usually be special, setting forth the relation of the parties and the contract or wrong by means of which the money was received." This is not an action on an account, in the sense in which that term is used. That it does not set forth the relation of the parties, the contract nor the wrong, is manifest. Failing by his petition to do that however, which failure could have been reached by motion to make the petition more definite and certain, if not by demurrer, did not absolve the plaintiff from its obligation to make out at least a prima-facie case by proof; proof of the facts essential to a recovery. We have set out the answer of defendant in this case practically in full. That answer admits defendant retained the amount of money and on the dates set out, but it specifically puts in issue the very essential allegation that the money so retained was of the moneys of the plaintiff, or that the defendant had and received that money to the use of plaintiff. That is specifically denied in the answer. The reply repeats the original averment. We might here apply this test: Could the plaintiff, with the answer of defendant admitting that he had retained the $1600, have successfully moved for judgment on the answer? The learned counsel for plaintiff made no such motion, does not here make any such contention. The burden of proof was on the plaintiff, notwithstanding the answer. Without going into the question to any great extent, or attempting to compile the authorities governing the matter, we consider it suffi-

Digitized by Google

cient to refer to two cases, namely, Glover v. Henderson, 120 Mo. 367, 25 S. W. 175, and Marshall Livery Co. v. McKelvey, 55 Mo. App. 240. In the former of these cases, it is said (l. c. 382): "The obligation to prove any fact is upon the party who asserts the affirmative of the issue."

In Marshall Livery Co. v. McKelvey, supra, it is said, passing on an instruction given by the court, to the effect that the burthen of proof is on the plaintiff to establish to the jury's satisfaction by the preponderance of the proof, that the defendant failed to exercise ordinary care in driving and caring for the horse which he had hired from the plaintiff, and of which instruction plaintiff complained, that the objection "loses sight of the distinction between the burden of proof and the burden of evidence. The former remains throughout the trial where the pleadings place it in the first instance, while the latter may shift from side to side according to the state of the proof. . . . It was necessary for the plaintiff to allege and prove that in the use of the horse the defendant was guilty of some negligent act, and that the death of the horse was the result of such act. These were the constitutive facts of the cause of action. A prima-facie case was made by the introduction of evidence tending to prove that the horse, at the time of the delivery to the defendant, was apparently in good condition. If the evidence had closed at this point, the plaintiff would have been entitled to recover, provided the jurors were satisfied from the evidence that the horse was in a healthy condition at the time of its delivery to the defendant. Therefore, at this stage of the proceeding, the burden of evidence was cast on the defendant to show by some substantial evidence that he exercised ordinary care in the use of the animal." This ruling and the distinction between burden of proof and preponderance of evidence was lost sight of. It was error, in the absence of any showing whatever on the

Digitized by Google

part of the plaintiff, and with the very qualified admission in the answer of defendant, that admission coupled with a denial of the very essential averment in the petition that the money so taken and withheld by defendant was received and retained by him for the use of plaintiff, to hold that the burden of proof was at the outset and by the pleadings, upon the defendant.

Passing that and looking to the rulings at the trial, by which the trial court refused to allow the introduction of evidence tending to sustain the plea of *quantum meruit* and excluded evidence offered by defendant to show that he had performed the services at the instance and with the consent and knowledge of the officers and directors of the company, grave error was committed. The resolution introduced in evidence prima facie deprived defendant of any claim to salary, but did not conclude him from showing that he was not in fact included in it; from showing that, notwithstanding that resolution, he had continued in the employ of plaintiff, doing the work usually appertaining to the office of secretary and treasurer, and that he did the work with the consent, on the employment and with the knowledge of the officers and directors of the company. It was within his right, failing a contract fixing the amount, to follow that up with evidence of the reasonable value of those services. The rule invoked by counsel for plaintiff and sustained by the trial court, that no officer of the company is entitled to compensation, or to claim pay for services on *quantum meruit,* in the absence of a contract, or unless there is an express provision in the by-laws, or by resolution of the board, awarding him salary or pay, has no application whatever to this case. This defendant was neither a director nor stockholder of the company. He was titular secretary and treasurer at one time, treasurer at another, but in point of fact, as the evidence which he offered certainly tended to show, he was a mere hired employee.

Digitized by Google

The reason of the rule forbidding officers and directors of corporations to charge for services, unless that charge is founded on a resolution of the board, or is provided for in the articles, constitution or by-laws of the corporation, does not apply here. Corporations are, in a way, partnerships; the directors are themselves, under our law, members of the corporation, stockholders. Acting as directors, they are more than mere agents for their fellow stockholders; they are their trustees, in charge of a trust fund. They cannot charge or receive pay for any services rendered their costockholders—the *cestui que trust*—"unless compensation for such services is provided for in its charter or authorized by a by-law, or resolution of the board of directors before the services are rendered." [Taussig v. St. Louis & Kirkwood Ry. Co., 166 Mo. 28, l. c. 33, 65 S. W. 969; Watcham v. Inside Inn Co., 159 Mo. App. 33, l. c. 40, 139 S. W. 228.] But as concerns directors, "it is well-settled law in this State that the acts of a corporation may be proved in the same manner as the acts of individuals, and that a promise to pay the reasonable value of services rendered and accepted may be implied against corporations as against individuals." [Taussig v. St. Louis & Kirkwood Ry. Co., supra, l. c. 32.] If this defendant rendered services at the request, or by the direction, or even with the knowledge of the officers, directors, managers of the company, and they accepted the services, he having no contract fixing his compensation, unless it appears that the services were voluntary and rendered without expectation of reward, defendant is entitled to recover the reasonable value of such services on proof of their value.

The judgment of the circuit court is reversed and the cause remanded for further proceedings. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

LACLEDE LAUNDRY COMPANY, Appellant, v. HENRY W. FREUDENSTEIN et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted November 5, 1913. Opinion Filed December 2, 1913.

1. **CONVEYANCES: Contradiction of Consideration Clause: Parol Evidence.** Recitals of a deed as to the consideration are not a part of the contract, and parol evidence is admissible to explain, vary, or even contradict them; but the general rule is, that such evidence is not admissible where it will invalidate the deed or annul its covenants.

2. **———: Contradicting Implied Covenants Against Incumbrances: Parol Evidence.** In view of the fact that the words "grant, bargain and sell" in a general warranty deed, when unrestrained by any express terms contained in the deed, are, under Sec. 2793, R. S. 1909, to be construed as a covenant against incumbrances, parol evidence, tending to show that, in addition to the consideration recited in the deed, the grantee agreed to assume and pay taxes which were then a lien on the land, was inadmissible, since its admission would have limited or restrained the statutory implied warranty.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

REVERSED AND REMANDED (*with directions*).

Wilfley, Wilfley, McIntyre & Nardin for appellant.

(1) The foundation of a cause of action for a breach of warranty is, the existence of a deed with a covenant against encumbrances, proof of the existence of a valid encumbrance, and payment thereof by the grantee. Patterson v. Young, 81 Mo. 381. (2) Parol evidence is not competent to contradict or vary the terms of a written instrument, all precedent and contemporaneous negotiations being conclusively presumed to have been swallowed up by and merged in the

Digitized by Google

written instrument. Boyd v. Paul, 125 Mo. 13; Machine Co. v. Mackey, 100 Mo. App. 405; 17 Cyc. 613, 620. (3) Parol evidence is admissible to show the real consideration for the deed so long as it affects only the consideration, but it is not competent if it has the effect of contradicting any contractual term of the contract. Wigmore on Evidence, sec. 2433; 17 Cyc. 632; Railroad, 54 Mo. App. 644; Wisehart v. Gerhardt, 105 Mo. App. 116; Flynn v. Bourneup, 143 Mass. 247; Simonvitch v. Wood, 145 Mass. 180; Edison Co. v. Foundry Co., 194 Mass. 258; McLeod v. Skiles, 81 Mo. 595; Brown v. Morgan, 56 Mo. App. 382.

John W. Benstein for respondents.

The consideration in a deed or contract may always be inquired into and parol testimony is admissible to show the real consideration paid. Laudman v. Ingram, 49 Mo. 212; Nevydek v. Meyer, 46 Mo. 600; McConnel v. Brayner, 63 Mo. 461; Fontaine v. Savings Inst., 57 Mo. 561; Hollocher v. Hollocher, 62 Mo. 267; Rabsuhl v. Lack, 35 Mo. 316; Dickson v. Anderson, 9 Mo. 156.

REYNOLDS, P. J.—This is an action on the covenants of warranty in a deed, to recover $122.87 and interest, on account of city, school and State taxes for the year 1909. Plaintiff is grantee in the deed, defendants are grantors. The deed is in the usual statutory form and "grants, bargains, and sells, conveys and confirms," the property to plaintiff, defendants "hereby covenanting that they, their heirs and legal representatives will warrant and defend the title to the said premises unto the said party of the second part and unto its successors and assigns forever, against the lawful claims and demands of all persons whomsoever." It is dated January 14, 1909, and was then delivered. That the taxes were a lien upon the real estate at the time of the execution and delivery of the deed,

Digitized by Google

although not then due, is conceded, it being admitted that plaintiff had paid them and interest to discharge the lien, and that while plaintiff had demanded repayment thereof from defendants, this demand was refused. The deed recites $12,000 as the consideration, the receipt of which is acknowledged.

By their answer defendants set up that the $12,000 stated in the deed was not the real consideration, but that it had been agreed between plaintiff and defendants before and at the time of the execution of the deed and its delivery to plaintiff, that plaintiff assumed and would pay these taxes as part of the consideration of the purchase of the property.

There was a general denial of this by reply. Trial to a jury.

Evidence was offered by defendants tending to prove that such an agreement had been made between the parties by parol immediately before and at the time of the execution and delivery of the deed, and it was admitted by the court over the objection and exception of plaintiff.

The court refused an instruction asked by plaintiff, who duly preserved exceptions, to the effect that under the law and the evidence the verdict of the jury should be for the plaintiff. At the request of defendants the court instructed the jury to the effect that if they found from the evidence that at the time of the sale and conveyance of the property described, it was understood and agreed between plaintiff and defendants that plaintiff assumed and agreed to pay the taxes assessed against the property for the year 1909 as part consideration of the purchase price of the property, their verdict should be for defendants. This was duly excepted to by plaintiff.

The jury returned a verdict in favor of defendants, from which, after interposing a motion for a new trial

Digitized by Google

and excepting to that being overruled, plaintiff has duly perfected its appeal to this court.

There is but a single question for determination in this cause, namely, the correctness of the action of the trial court in admitting parol evidence of the alleged agreement between the parties, made at or immediately prior to the execution and delivery of the deed, that plaintiff, in addition to the consideration named in the deed, had, as part of the consideration, verbally agreed to pay the taxes for the year 1909, those taxes then a lien on the property. The contention of learned counsel for appellant, while conceding that it is admissible to show the real consideration for the deed, so long as it affects only the consideration, is, that such evidence is not admissible if it has the effect of contradicting the warranty in the deed itself, and it is claimed that such is the effect here. It appears by the abstract of the proceedings at the trial that this evidence was admitted by the learned trial judge on the theory that where there are contemporaneous verbal agreements entered into at the same time, one may modify the other; under this theory he held that he would allow the defendants to show, if they could, what the real consideration was. "That," said the court, "does not destroy the deed. It does not affect the validity of the deed." It was under this view of the law that the instruction asked by defendants and above set out was given and that asked by plaintiff refused.

While in the earlier cases the courts, English and American, took the view that the rule of evidence, that a written instrument could not be varied by parol, applied to the consideration clause as well as to other portions of the deed, the later and American view now almost universally adopted, certainly adopted in our State, to give it in its broadest terms, is, that the recitals of a deed as to the consideration, are not a part of the contract, and parol evidence is admissible to

Digitized by Google

explain, vary or even contradict them. In the great majority of cases, however, in which the rule has been stated so broadly, the purpose of introducing the evidence was not to invalidate the deed as a conveyance or to annul its covenants. Where the introduction of the evidence will have that effect, the general rule is that the evidence is not admissible. We take the above substantially from notes to the case of Shelby v. Cunningham, 81 Ohio St. 289, the note being on page 1195, 25 L. R. A. (N. S.). The first part of this paragraph is credited by the annotator to 6 Am. & Eng. Ency. of Law (2 Ed.), p. 767. Reading further in this volume of the American & English Encyclopedia of Law, at page 775, following the discussion of the admissibility of evidence to vary the consideration expressed in the deed or written contract, when the statement of the consideration is merely the recital of a fact, it is said: "When, however, the statement of the consideration leaves the field of mere recital and enters that of contract, thereby creating and attesting rights, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by extrinsic evidence." Jackson v. Chicago, St. Paul & Kansas City R. R. Co., 54 Mo. App. 636, a decision of the Kansas City Court of Appeals, the opinion by Judge ELLISON, is cited and quoted from as one showing the difference between the statement of a consideration in a deed as a mere recital of a fact and as a contractual stipulation.

Treating on the subject of the admission of parol or extrinsic evidence to vary deeds and written contracts, the law is thus summarized by accepted authority: "Where a writing, although in the form of a receipt, also embodies the elements of a contract, it is, in so far as it expressed the contract or is contractual in its nature, subject to the same rules as any other contract, and is not open to contradiction by parol; and of course the mere fact that a contract, as part of its

Digitized by Google

terms, acknowledges the receipt of certain money or property does not render the writing a mere receipt." [17 Cyc., p. 632, par. III.]

The same authority further says, pars. f and g, p. 659: "That the consideration to be shown by the parol evidence must be consistent with that stated in the writing, otherwise the evidence cannot be admitted;" and that "where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom, would be to change or defeat the legal operation and effect of the instrument, or to add new matter to an agreement complete upon its face, the evidence is not admissible; for in such case it comes within the rule which forbids the introduction of parol evidence to vary, contradict, or defeat a written instrument, and not within the exception to that rule that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the writing."

Recurring to Shelby v. Cunningham, supra, the decision a late one, handed down December 21, 1909, we find the question very fully discussed. The point in decision is compactly stated in the syllabus thus: "The consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, but for every other purpose it is open to explanation by parol proof, and is prima-facie evidence only of the amount, kind and receipt of the consideration."

In Patterson v. Cappon, 125 Wis. 198, an action for damages for the breach of covenants of peaceable and undisturbed possession, the defense was that the grantee had agreed to pay a certain tax over and above the stated consideration. It was held not to constitute a defense, the agreement to pay the tax being extrinsic, by parol, not covered by the conveyance itself, which contained the usual covenants of title, etc. The eviction

Digitized by Google

occurred under a tax deed given on the sale of the land for these taxes. It is said by the Supreme Court of Wisconsin (l. c. 202), that in order that this outside agreement "should be any defense against the plaintiff's cause of action as above described, it must be construed as impliedly asserting that by extrinsic agreement between the defendant and Debus (plaintiff's grantor) it was stipulated that the former should not covenant or warrant against this incumbrance. Obviously, however, if that fact were established, it could constitute no defense against the plaintiff's action. It would constitute a direct contradiction of the express covenant of the deed, and this cannot be permitted. Defendant refers us to the familiar line of authorities holding that the consideration of a deed is open to examination and proof by parol evidence; also that proof of other elements of the contract involved in the sale and purchase of real estate is not excluded by the deed, for the reason that the instrument is, in its very nature, but an expression or execution of a part of the contract in fact made. But these authorities all recognize the qualification that it is not permissible thus to contradict such parts of the contract as are expressed in the deed itself."

In Stanisics v. McMurtry, 64 Neb. 761, an action to recover for a breach of a covenant against incumbrances in a deed executed by defendant to the plaintiff, it was held that evidence of an agreement made contemporaneous with and as a part of the negotiations leading up to the execution of the deed, should not have been received. Among other authorities cited by the Supreme Court of Nebraska in support of this holding, is that of MacLeod v. Skiles, 81 Mo. 595.

In Simanovich v. Wood, 145 Mass. 180, it is held that in an action for breach of a covenant against incumbrances in a deed of land from the defendant to the plaintiff, oral evidence is inadmissible to prove that at the time the deed was given, and as a part of the

Digitized by Google

consideration, the plaintiff promised to pay an assessment for taxes then a lien upon the land.

Turning to the decisions of our own courts, we find them generally in line with the foregoing authorities—we say generally, because there are a few cases that at first reading and without careful consideration seem somewhat out of line.

Thus Laudman v. Ingram, 49 Mo. 212, in which it is said by the judge who wrote it (l. c. 213): "It seems to me that there is very little conflict in the authorities that one may prove by parol evidence additional considerations not inconsistent with the one mentioned in the deed." This is repeated at page 214. But if this is to be taken literally, and without reference to the covenants in the deed, the authorities almost unanimously condemn it. Referring to the consideration, it is said that "the balance of such consideration was the taxes for the current year, which in each case were to be assessed in the respective names of the grantees and paid by them." It seems that the controversy was over the payment of these taxes. If the agreement to pay them was in the deed, as might be assumed from the language of the judge who wrote the opinion, we can easily understand what is meant, and in that event the remark first above quoted is correct and in line with authority.

In Fontaine v. Boatman's Saving Institution, 57 Mo. 552, Judge WAGNER says (l. c. 561): "Whilst it is true that parol evidence will not be admissible to vary the effect of the deed, we do not understand that the deposition of the plaintiff was offered for that purpose. It was simply to show the circumstances and condition of the parties at the time it was executed, and rebut the idea that the consideration expressed in it was ever paid, and for these objects it was properly admitted. The consideration clause in a deed has only the force and character of a receipt, and is always open to explanation and contradiction." Necessarily

Digitized by Google

these remarks are to be applied to the case before the court. There is no intimation here that parol evidence to contradict the stated consideration is admissible, if that evidence destroys the covenants in the deed. That this is the meaning and limitation to be put upon these and the like cases often referred to in support of the broad proposition that you can always attack the stated consideration and that the recital of it in the deed or contract is no more than a receipt, is made entirely clear by what is held by our Supreme Court in MacLeod v. Skiles, supra. There (l. c. 603) it is said: "This suit brings us to a consideration of the question whether it is competent for a party, as in this case, to accept a deed for real estate with an express covenant therein to warrant and defend the title thereto against the claim of every person whatsoever, save and except taxes of 1877, and then turn around and show that the covenantor, by a contemporaneous parol contract agreed to pay the taxes thus expressly excepted by the written contract in the deed so accepted. It is elementary law that upon the execution, delivery and acceptance of a deed or written instrument, all prior or contemporaneous parol stipulations are merged in the deed or writing, and cannot afterward be set up to contradict or vary the same. It is scarcely necessary to refer to elementary authority or adjudged cases to establish so plain and recognized a doctrine as this. . . . There may be cases seemingly at variance with this well-established rule, but when propely considered, they will be found to turn mainly upon questions and principles altogether different from those involved in the case at bar. Such, we think, for the most part, are the cases cited in the brief of plaintiff in error. [Nedvidek v. Meyer, 46 Mo. 600; McConnell v. Brayner, 63 Mo. 461; Laudman v. Ingram, 49 Mo. 212.] These cases properly considered, go to the extent that when it is material to show the amount or character of the consideration of a deed, parol evi-

Digitized by Google

dence, not inconsistent with that named in the deed, may be received. The question now before us, as we think, is not one as to the character or the amount of the consideration, which is clearly and expressly stated in the deed, but one as to the force and effect of an express covenant in the deed, and the admissibility of parol evidence to contradict or vary the same. The covenant in this deed especially saves and excepts the taxes of 1877. The party cannot accept a deed with such a covenant and escape its force and effect by verbal protestations and stipulations to the contrary. If he does not like the deed with such a limitation he had the right, and it was his plain duty, not to accept it at all. He was not compelled to do so. By its acceptance he abandoned and waived the prior written agreement which called for a general warranty."

In line with the rule which we draw from the authorities, is the decision of the Kansas City Court of Appeals, in Jackson v. Railroad Co., supra, cited and quoted from in 6 Am. & Eng. Ency. of Law (2 Ed.), note, p. 775, as is also Brown v. Morgan, 56 Mo. App. 382. It is held in this case that where a deed conveying land contains a covenant against incumbrances, evidence of a contemporaneous oral agreement by the grantee to assume an existing incumbrance on the land as a part of the consideration for the conveyance, is not competent. Of Laudman v. Ingram, supra, it is said by Judge ROMBAUER, delivering the opinion, it "is so meagre in its statement of facts and so indefinite in its statement of the law that we cannot construe it as giving sanction to a proposition which otherwise is devoid of all logical elements." So also we say in reference to that case.

The cases bearing on this question are very thoroughly considered by Judge GOODE in See v. Mallonee, 107 Mo. App. 721, 82 S. W. 557. There it is said (l. c. 732), after a very full citation and analysis of the cases, that "it is thus apparent from a uniform line

Digitized by Google

of decisions in our State from its earliest days, that it is competent to show the real consideration for a conveyance of land by oral testimony which contradicts the recited consideration, unless the effect of the evidence is to destroy the deed by showing there was no consideration for it, or that the consideration was a good instead of a valuable one, or, unless the named consideration is stated in such a manner as to show the parties intended it to be an essential term of the written instrument."

The recent case of McDaniel v. United Rys. Co., 165 Mo. App. 678, 148 S. W. 464, while not involving the construction of a deed, does involve that of a written contract. It is there said by Judge NORTONI (l. c. 691): "The rule is now firmly established that when a statement of the consideration in a contract or deed is merely formal it may be contradicted or explained by parol evidence. In such cases the consideration clause is not deemed an essential part of the instrument, but instead is regarded as a mere recital of fact and as such may be contradicted," citing cases. But Judge NORTONI then had in mind and very clearly before him the limitation on this rule, for he continues: "However, the rule is subject to some exceptions; for instance, one may not be allowed to contradict a consideration expressed in a deed executed by him, to the end of defeating the operative words of the deed. . . . Furthermore, when the statement of the consideration contained in the instrument leaves the field of mere recital and enters that of contract, thereby creating and attesting rights as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by extrinsic evidence, for to permit it to be thus overthrown would infringe the rule affording immunity from parol attack to written contracts."

Some point is made as to the effect of section 1874, Revised Statutes 1909. In Wishart v. Gerhart, 105 Mo.

Digitized by Google

App. 112, 78 S. W. 1094, where that section, then section 645, Revised Statutes 1899, was invoked, it is held that this section does not affect the law of estoppel, and that it affords no aid to a grantor seeking to defeat the conveyancing effect of the deed by showing it was voluntary, nor is parol evidence admissible to alter or contradict the legal construction of the deed.

If we may venture to state the rule we gather from the authorities, some of them rather difficult to understand, and some of them stating the rule broadly or loosely, and so often presenting an apparent conflict, more apparent than real, among the decisions, the rule often stated by others, we would state it thus: Ordinarily you may attack the consideration, but when to do so involves an attack upon the solemn covenants in the deed or contract, that attack resting on a parol agreement, outside of the deed or contract, it cannot be sustained. The great mass of authorities clearly distinguish between the admission of parol evidence to sustain an attack upon the stated consideration and under an attack upon the consideration really make an attack upon the covenants of the deed itself. We have referred to a few—in them will be found reference to the very many cases covering this. We do not think it necessary to cite them.

In the case at bar we have the statutory general warranty deed; the statutory words "grant, bargain and sell," unrestrained "by any expressed terms contained in" the conveyance. [Section 2793, Revised Statutes 1909.] Under this statute these words, so used and without restriction in the deed itself, are to be construed as covenants against any and all incumbrances. In the case at bar we have here presented an attempt to limit that covenant, to restrain it, by an outside agreement resting in parol, no restraints or limitations expressed in the deed itself.

The judgment of the circuit court was therefore pronounced upon a verdict which could only be sus-

Digitized by Google

tained on evidence which was received contrary to the established principles and rules of law; in effect, evidence of an agreement by parol which would constitute a restraint upon the covenants in the deed, the restraint not expressed in that deed.

The judgment is reversed and the cause remanded, with directions to the circuit court to enter up a judgment for plaintiff for the amount of the taxes and interest or penalties paid, and for interest thereon, after having ascertained that interest, and for costs. *Norton* and *Allen, JJ.*, concur.

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1914.

JAMES A. GIBSON, Guardian, Respondent, v. ALICE POLLOCK, Appellant.

Kansas City Court of Appeals, April 6, 1914.

1. **CORAM NOBIS: Insanity: Assault: Pleading.** In a petition for a writ of error *coram nobis* to set aside a judgment rendered against an insane person for assault and battery on a trial when he was insane if it is alleged that he was insane at the time of the trial and judgment, it is not necessary to also allege that he was insane when he committed the assault.

2. **INSANE PERSON: Torts: Civil Liability: Defence.** An insane person is civilly liable for his torts, such as assault and battery, but if an action is brought against him he must have the right and benefit of a defence by a sane person (either himself recovered or a guardian) to ascertain if he committed the tort.

3. **WRIT OF ERROR: Judgments: Insane Person.** The office of a writ of error is to nullify judgments, proper on the face of the record, but improper by reason of facts not appearing by the record. And it may be invoked to annul a judgment taken against an insane person.

4. ———: ———: ———: **Pleading: Demurrer.** Where a petition for writ of error *coram nobis* alleges in general terms that the insane person "had a good and complete defense to said action" for assault and battery charged against him, it is sufficient after judgment, even though it be conceded to be bad if attacked by special demurrer for not alleging the facts constituting the defence.

Digitized by Google

5. ———: **Guardian: Pleading.** Where a petition for a writ of error *coram nobis*, is in the name of a guardian for an insane person, an objection to it on that ground is waived unless it be made a ground of special demurrer.

6. ———: **Insane Person: Trial: Evidence: Defence.** On trial of a writ of error *coram nobis* to set aside a judgment on the ground that it was rendered against an insane person for an alleged assault and battery, it is not necessary to prove facts showing that such person had a good defence to the action for assault and battery.

7. ———: **Insanity: Evidence.** Evidence showing a person carried on imaginary conversations with the dead and with the angels; that he preached sermons to imaginary congregations through the night, is sufficient upon which to base a finding of insanity.

8. ———: **Limitations: Laches.** The Statute of Limitations does not run against a writ of error *coram nobis*; and though a judgment against an insane person attacked by such writ has been rendered more than five years, yet if only a period of eighteen months has passed since the appointment of a guardian before he brings his action, there is no laches.

Appeal from Buchanan Circuit Court.—*Hon. L. J. Eastin,* Judge.

AFFIRMED.

James W. Boyd for appellant.

Chas. F. Strop and *Eugene Silverman* for respondent.

ELLISON, P. J.—On the 19th of May, 1903, a judgment was rendered in favor of defendant Alice Pollock, against Frederick Reischel in the sum of one thousand dollars. The ground of her action against Reischel was assault and battery. On the 11th of August, 1908, this plaintiff as guardian for Reischel, instituted this action in the nature of an application for a writ of error *coram nobis,* whereby he seeks to set aside such judgment on the ground of error of

Digitized by Google

fact, viz., the insanity of Reischel, which fact did not appear on the record in the action for assault and battery. The trial court sustained the application and set aside the judgment with a view to allowing the guardian to file an answer and defend against the action. Alice, as defendant in this proceeding, appealed to this court.

Defendant demurred to plaintiff's petition on the ground that it failed to state a cause of action. The demurrer was overruled, and she then filed an answer consisting of a general denial and that no cause of action was stated. While an answer ordinarily waives a demurrer, it does not do so when the objection is a failure to allege facts sufficient to constitute a cause of action, and we therefore will examine into the sufficiency of the petition.

It is claimed that though the petition alleges that at the time of service of process in the action for assault and battery and at the time of the trial of that action, Reischel was insane and that no guardian was appointed for him, yet it is fatally defective in that it is not alleged that he was insane when he made the assault on Mrs. Pollock. In support of this proposition defendant has cited us to an array of authority to the effect that a judgment against an insane person is not void, and that "Process and judgment go against the lunatic as against other parties." [1 Black on Judgments, Sec. 205; 1 Freeman on Judgments, Sec. 152; Jamison v. Culligan, 151 Mo. 410, 16; Redmond v. Railroad, 225 Mo. 721, 729; 10 Encyclopedia Pleading & Practice 1224.] And that a lunatic is civilly liable for his wrongful trespass such as for assault or for destruction of property. [Barry v. Moore, 78 Pa. St. 407, 413; Behrens v. McKenzie, 23 Iowa, 333, 342; Morain v. Delevin, 132 Mass. 87; 11 Am. & Eng. Ency. of Law (1 Ed.) 127.]

In our opinion these propositions fail to support the objection to the petition. The allegations therein

Digitized by Google

are not, directly or indirectly, inconsistent with the law thus stated. An insane person is liable for his torts, but he must have the right and benefit of a defence made by a sane person (either himself recovered, or a guardian) to ascertain if he committed the tort. The face of the proceedings against him not showing the fact of insanity and consequently that he was disabled to defend at the time of the trial, the judgment appears to be valid, and the only way he may have defence is to set it aside by writ *coram nobis,* for error of fact not disclosed by the record. The office performed and the practical application of this writ has been stated and illustrated many times in this state. [State v. Wallace, 209 Mo. 358, 365; State ex rel. v. Riley, 219 Mo. 667, 683; State v. Stanley, 225 Mo. 525, 532; Dugan v. Scott, 37 Mo. App. 663.]

But while defendant seems to concede the writ would be allowable in cases where the judgment was against an infant, deceased person, etc., she insists that since the judgment against an insane person is valid, the writ will not aid such person. This idea leaves out of view what we have just written, that, if properly applied for, there must be opportunity afforded for defence by a sane person. And insane persons are included with those mentioned as being entitled to the writ. [Heard v. Sack, 81 Mo. 610, 616; State v. Wallace, supra, l. c. 364; State ex rel. v. Riley, supra, l. c. 682; Dugan v. Scott, supra, l. c. 670; Hadley v. Bernero, 103 Mo. App. 549, 561; 23 Cyc. 884.]

It is further contended that the petition fails to state a cause of action in that it does not allege facts showing that Reischel had a good defence which he could, and would, offer if given an opportunity. Many cases are cited in support of the proposition that such allegation should be made to set aside judgments by default and in some other instances when a party had failed to make a proper defence; or for some irregularity. These are not applicable. In proceeding for

Digitized by Google

the writ of error *coram nobis,* it has been held that no inquiry can be had into the cause of action upon which the judgment is founded. [Higbee v. Comstock, 1 Denio, 652; Breckenridge v. Coleman, 46 Ky. 331, 335; 23 Cyc. 884, 885.]

But it is not necessary that we should decide the matter as a question of pleading, since, in our opinion, the petition is sufficient after judgment. It does not set out the facts of defence which existed in Reischel's favor in the action of assault and battery; but it does allege "that the allegations in said petition so filed by Alice Pollock as aforesaid were untrue and that said Frederick Reischel had a good and complete defence to said action." The sufficiency of those allegations might be attacked by proper demurrer, but they are not so deficient as not to be curable by verdict or judgment. The allegations being of that character, defendant's answer waived objection to them.

Another objection to the petition is that it should not have been entitled as "James A. Gibson, Guardian and Curator of Fredric Reischel, Insane;" that, as it stands, Gibson is the plaintiff instead of Reischel, and that he is not a proper party plaintiff. But this also should have been made a ground of special demurrer; or specially set up in the answer; otherwise, it is waived. [Baxter v. St. Louis Transit Co., 198 Mo. 1; Gibson v. Schull, 251 Mo. 480.],

But during the introduction of evidence the question was presented whether the merits of the action for assault and battery were an issue in the present proceedings. The trial court ruled they were not, and we believe the ruling was correct. Keeping in mind that the ground of plaintiff's present complaint is that a trial was had of an insane man and that a judgment was rendered against him, we cannot see the reason for, or propriety of trying the merits of the action in which such judgment was had. [Higbee v. Comstock, 1 Denio 652; Breckenridge v. Coleman, 46 Ky.

Digitized by Google

331, 335; 23 Cyc. 884, 885.] In the first of these cases, the court, per BEARDSLEY, J., said: "We cannot, as I think, look at the cause of action upon which the judgment was recovered, and if we find that the party who now asks an allowance of the writ acted with palpable dishonesty and bad faith, refuse its allowance on that ground. I find no authority which would justify such a course, and none of this character was referred to by counsel who opposed this motion. I am persuaded that no writ of error has ever been refused on such a principle." In the circumstances of a case like the present, the merits of the controversy will be tested when both sides may be represented by sane men.

An examination of the evidence bearing on Reischel's sanity at the time Mrs. Pollock's action was brought against him and at the time of the trial and the judgment in her favor does not justify us in interfering with the conclusion reached by the trial Judge. Her action was instituted on the 2nd of March, 1903 and, as stated at the outset, judgment was rendered against him for $1000 in the following month of May, and the present proceeding was instituted in August, 1908. The evidence clearly shows that prior to the year 1903 and during that year and continuously to the 22nd of March, 1907, he was insane, and on the latter date he was so adjudged by the probate court of Buchanan county. He carried on conversations (as he thought) with the dead and the angels. He would preach sermons on his porch to imaginary congregations. One witness said that "Sometimes he would sing, and then he would exhort, and was as near a maniac as any man could be." In some of his preaching he used "very vulgar language" and attracted the attention of the neighborhood, and he kept it up frequently until past midnight. At one time he tried to set fire to his neighbor's woodshed. His family left him and he lived alone in his house for several years.

Digitized by Google

We will not go into more detail; sufficient to say he was finally formally adjudged insane as above stated. We have not overlooked evidence in his behalf of his caring for himself; that he purchased meat and groceries for himself, though sometimes when they were delivered he would "holler and yell and sing;" and that he drew a pension. Undoubtedly he did sane acts and may not have been *continuously* giving evidence of aberration. An insane person will frequently act sane and do sane things; but a sane man will not persistently, or frequently do things insane.

It will be noticed that this proceeding was not begun until more than five years after the judgment was rendered. But it seems to be conceded that the Statute of Limitations does not apply to writs *coram nobis* (Powell v. Gott, 13 Mo. 458) though it is suggested by defendant that plaintiff was guilty of such laches as to justify a refusal to grant him relief; and she cites Baker v. Cunningham, 162 Mo. 134, 144. While more than five years had elapsed between the date of defendant's judgment and the bringing of this action, yet only about eighteen months had elapsed after the appointment of a guardian. In such circumstances we think there was not such delay as to bar the writ. Plaintiff stoutly maintains that defendant has no proper bill of exceptions. In the foregoing we have assumed the bill to be regular and valid.

We have carefully considered other minor objections to the judgment, but think them not well founded and hence affirm the judgment. All concur.

Digitized by Google

PAUL D. HIGBEE, Respondent, v. WESTERN UNION TELEGRAPH CO., Appellant.

Kansas City Court of Appeals, April 6, 1914.

1. **TELEGRAPH AND TELEPHONES: Telegram: Delivery: Promptness: Penalty: Agent.** The sender of a telegram handed it to the telegraph company's agent to transmit and have delivered at the same time paying the charges asked by the agent. The message was not promptly delivered to the addressee as required by the statute (Sec. 3330, R. S. 1909) and it was held that the agent's count of the words in the message and his statement and acceptance of the charge therefor was binding on the company, and it was therefore liable to the penalty of the statute for not delivering.

2. **———: Words "alright" and "all right": Count: Charge: Agent.** Whether the expression "alright" in a telegraph message should be counted as one word or as two words, "all right," is a matter to be determined by the telegraph company's agent who received the message for transmission and fixed and collected the charge and his count and charge will bind the company.

3. **———: Statute: Rules: Agent: Estoppel.** The statute requiring prompt delivery of telegraph messages and imposing a penalty for failure to do so is conditioned on the prepayment of proper charges demanded under the rules of the company. But if the company's agent counts the words of the message and announces the charge to the sender which the latter pays him, the company, in avoidance of the penalty for nondelivery, cannot claim that the proper charge was not paid to it.

Appeal from Adair Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

AFFIRMED.

Fred S. Hudson for appellant.

Higbee & Mills for respondent.

ELLISON, P. J.—Plaintiff's action was instituted to recover of the defendant telegraph company the stat-

Digitized by Google

utory penalty of $300 for failure to deliver a telegram to the person to whom plaintiff addressed it. The answer was a general denial. He obtained judgment in the trial court.

The statute (Sec. 3330, R. S. 1909) makes it the duty of a telegraph company receiving a message and upon payment or tender of its usual charge as established by its rules, "to transmit and deliver the same to designated address and to use due diligence to place said dispatch in the hands of the addressee, by the most direct means available, without material alterations, promptly and with impartiality and good faith under a penalty of three hundred dollars for every neglect or refusal, . . . two thirds of the amount recovered to be retained by the plaintiff and one third to be paid into the county school fund" etc.

Plaintiff was on a railway train at Pattonsburg, Missouri, and desired to send a telegram to his brother at Lancaster in the same State. While the train was stopped at the station he went into defendant's office and gave to its agent the following despatch written on the back of a blank bank check:

"Pattonsburg, Mo. 4-27-12.
Walter Higbee, Lancaster Mo.

Everything alright. Home on 19. No time to phone.

Paul D. Higbee."

The agent received the despatch from plaintiff, read it, looked up the rate and said the charge would be twenty-five cents, which sum plaintiff immediately paid him and then got back upon the train. This was about one o'clock in the afternoon. The agent sent the message and it was received by defendant's agent at Lancaster at three-thirty the same evening but was not delivered to the addressee, who was known to the agent and who was at his office, until the next morning. No reason or excuse appeared for not delivering

Digitized by Google

promptly during the remainder of the day of its receipt.

It is claimed by defendant that the written expression, "alright," should be counted as two words, and that each figure in "19" should be counted as one word; and that thus counted, there were eleven words, the rate of charge for which, under the rules of the company, was twenty-seven cents, and that amount being two cents more than plaintiff paid the agent for transmission and delivery, the duty imposed by the statute for prompt delivery did not arise.

We need not ask whether there is such single word as "allright" or "alright"; or whether "all right" is one compound word or two separate words. The fact is, that defendant's agent received and accepted the message and stated and accepted his charge for its transmission and delivery as it was written; and whether he counted "alright," as one or two words, was of no concern to plaintiff. For all practical contractual purposes in the matter of receiving messages and receiving compensation for their transmission and delivery, he was the defendant itself.

But defendant says that even though its agent knowingly accepted the money demanded of plaintiff as in full payment for the message as written, if it was not correct—if it was less than the charge authorized by its rules, it did not relieve him from a necessity to pay the amount which its rules required. The cases of Dunne v. Railroad, 166 Mo. App. 372, 377; Sutton v. Railroad, 159 Mo. App. 685 and Railway v. Mugg, 202 U. S. 242 are cited in support of that assertion. They have no application. They are cases involving the question of a right to charge a different rate of freight from that posted with the interstate commerce commission, and upholding the right of the railway to receive the authorized rate even though its agent had agreed to a less rate.

Digitized by Google

It is true, the statute itself conditions defendant's duty upon the payment of the charges prescribed by its rules. And, in an opinion by Judge TRIMBLE, we said that a plaintiff "in order to recover must bring himself clearly within its terms and provisions, and show that his case comes clearly within its manifest spirit and intent." And that "the liability to the penalty is made to rest on the failure to promptly transmit *on payment or tender of the usual charges.*". [Adcox v. Telegraph Co., 171 Mo. App. 331, 337.] But in the absence of knowledge upon the part of the sender of a message as to the rate chargeable under the rules of a telegraph company, the sender has a right to rely upon the charge made, received and accepted, by the company's agent as being the correct charge under its rules.

Furthermore if plaintiff, without intent to defraud (and there is no pretense that he had such intent) thought the expression "alright" was one word, and defendant's agent so accepted it and made the charge on that basis, he was acting out the purposes for which defendant kept him in its service—he was within the scope of his employment and defendant was bound.

There was no error and the judgment is affirmed. All concur.

FRANK H. DAVIS, Respondent, v. A. J. McCOLL et al., Appellants.

Kansas City Court of Appeals, April 6, 1914.

1. **BILLS AND NOTES: Uncertain as to Amount or Time of Payment: Promissory Notes: Negotiability.** Under the provisions of the Negotiable Instruments Act, Secs. 9972 and 9973, R. S. 1909, a note is not made non-negotiable by reason of the fact that it contains a provision for attorneys' fees and for an extension of time of payment without notice, but, in the absence of such statute, either of such provisions would destroy its negotiability.

Digitized by Google

2. ———: **Non-negotiable Instrument: Endorser's Liability.** The mere writing of his name on the back of a non-negotiable instrument does not make one liable as an endorser. There must be proof of the agreement under which the endorsement was made and that it was for a sufficient consideration. Consequently, the mere introduction in evidence of a non-negotiable note will not make out a case against an endorser, even if proof is made of his signature.

3. ———: **Locus of Contract.** A note made in a foreign State and payable there is a contract of that State, and the liability of parties thereon is to be determined by the law of that State.

4. **EVIDENCE: Statute of Foreign State: Judicial Notice.** Judicial notice cannot be taken of the statutes of a foreign State when they are issuable facts in a controversy. Formal proof must be made of them as of any other fact, and it is immaterial that the court may be possessed of independent knowledge of such foreign laws.

5. ———: ———: ———: **Application of Law of forum.** In suits on a foreign contract it is only where there is neither proof nor ground for presumption as to what the law of such foreign state is, that the court is justified in applying the laws of the forum.

6. ———: **Law of Foreign State: Common Law: Presumption.** Whenever it appears or is shown that a law is in force in a foreign state the presumption is that it continues in force until the contrary is shown. Consequently, if the foreign state is one in which the common law was established, prior to its admission into the Union, by statutes or governmental acts within the judicial notice of the court, and no proof is made as to the foreign law, the court is required to presume that the common law having been once in force there, has continued and is still in force.

7. ———: ———: ———: ———: **States not Subject to the Common Law: Lex Loci Contracts.** It is only in respect of those States which were never subject to the common law, prior to their admission into the Union, that, in the absence of proof as to the *lex loci contractus*, the court will apply the statute laws of the forum.

8. ———: ———: ———: ———: ———. Although Iowa was originally a part of the Louisiana Purchase and was, therefore, under the French Law, yet, as the common law was, prior to her admission as a state, put into force there by the Territorial Laws of Missouri and by Acts of Congress, of

Digitized by Google

which the court must take judicial notice, therefore, the common law must be presumed to be in force there, upon the question involved, until the contrary is shown.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

REVERSED AND REMANDED.

Hughes & Whitsett for appellants.

Lathrop, Morrow, Fox & Moore for respondents.

TRIMBLE, J.—In this case plaintiff brought five suits in a justice court of Jackson county, Missouri, upon five notes by merely filing with the justice the said notes without further statement of his cause of action. Summonses were issued and served upon the defendant in each of the suits and on the return day judgment was rendered for plaintiff. Defendant appealed to the circuit court where the five suits were by agreement consolidated into one.

A jury was waived and the cause submitted to the court. Plaintiff offered in evidence the five notes and rested. Defendant demurred. The court overruled the demurrer and rendered judgment for plaintiff on the notes. Defendant appealed.

All of the notes are dated at Des Moines, Iowa, December 29, 1906, and are identical, except they respectively fell due on the first days of August and October, 1907, and April, May, and July, 1908. The following sets forth the other terms of all of the notes:

"$200.00. Des Moines, Ia., Dec. 29, 1906.

On or before the 1 day of May, 1908, for value received I promise to pay to the order of A. J. McColl the sum of two hundred dollars, payable at Des Moines, Iowa, with interest at 8 per cent per annum from date. Interest payable semiannually.

Digitized by Google

Upon default of payment of this note the makers, endorsers, guarantors and sureties agree to pay all attorneys' fees and expenses of collection, and consent that any Justice of the Peace may have jurisdiction of this note to the amount of $300 and—do hereby severally waive demand of payment, protest and notice of protest of this note, and consent that time of payment may be extended without notice. A failure to pay interest when due shall cause this note to become due.

A. W. DUDLEY."

On the back of each appeared the following: "A. J. McColl. Without recourse on me. J. S. Turrill." The name of A. J. McColl on the back of the notes was admitted to be his signature.

It will be observed that the notes provide for the payment of attorneys' fees and expenses of collection, and that the time of payment may be extended without notice. Under the statutory provisions of the Negotiable Instrument Law, this would not destroy their negotiability. [Sections 9972, 9973, R. S. Mo. 1909.] However, without these statutory provisions, the notes are not negotiable. [McCoy v. Green, 83 Mo. 626, l. c. 633; First National Bank v. Gay, 63 Mo. 33; Samstag v. Conley, 64 Mo. 476; Creasy v. Gray, 88 Mo. App. 454; Culbertson v. Nelson, 93 Iowa, 187; Woodbury v. Roberts, 59 Iowa, 348; Chouteau v. Allen, 70 Mo. 290; Coffin v. Spencer 39 Fed. 262.]

And it will be further noticed that the notes were all made in Iowa, are payable in Iowa, and are, therefore, Iowa contracts. [39 Cyc. 898; The South Missouri Land Co. v. Rhodes, 54 Mo. App. 129; Central National Bank v. Cooper, 85 Mo. App. 383; Case Threshing Machine Co. v. Tomlin, 161 S. W. 286, l. c. 289 and cases cited.]

If the note is nonnegotiable the mere writing of his name by defendant McColl on the back thereof will not make him liable as an endorser. There must be proof of the actual agreement under which the endorse-

Digitized by Google

ment was made and that it was for a sufficient consideration. [Shaffstall v. McDaniel, 152 Pa. St. 598; 4 Am. & Eng. Ency. of Law (2 Ed.) pp 479-80; Story v. Lamb, 52 Mich. 525; Frevall v. Fitch, 5 Wharton (Pa.) 325.] There is a vast difference between the liability of an endorser on a negotiable and a nonnegotiable instrument. [Norton on Bills and Notes (3 Ed.) 9; 1 Daniel on Negotiable Instruments (6 Ed.) Sec. 666.] Consequently, the mere introduction in evidence of a nonnegotiable note, with proof of the signature of the payee on the back, will not make out a case against one as an endorser. There must be proof of the contract made at the time of the indorsement. This is said without passing on the question whether any one but the immediate indorsee could sue the endorser of a nonnegotiable instrument.

There was no proof that Iowa has passed and has in force the statute known as the Negotiable Instruments Act, and the liability of defendant must be determined by the law of that state if the same can be ascertained or presumed. We cannot take judicial knowledge of the existence of such statute in Iowa. In Rashall v. Railroad, 249 Mo. l. c. 516, it is said: "Our courts do not take judicial cognizance of the laws of sister states or foreign countries when they are issuable facts in any controversy. In such cases formal proof must be made just as of any other fact, and it is immaterial that the court may be possessed of independent knowledge of the foreign laws."

But plaintiff contends that as there is no proof of what the law in Iowa is, we are authorized to apply the law existent and in force in our own state. This may be true where there is neither proof nor ground for presumption as to what the law in the other State is. In such case, since the court has no proof of the law in force in the other State and has nothing upon which to base a presumption as to what that law is, it will not say it is helpless and without law, but will apply the law of

Digitized by Google

its own forum, whether that be the common law or a statute. But whenever the other State in question is one concerning which we are required to take judicial knowledge of the fact that the common law was in force prior to its admission to the Union, then, in the absence of proof to the contrary, we must presume that the common law has continued in force and is still in existence there. If, however, the other state is one of which we can take judicial knowledge that the common law was never in force prior to its admission, we can in the absence of proof as to its law, apply our own statutes and system of law. As said in Hazelett v. Woodruff, 150 Mo. l. c. 540, "it is only in respect of those States which were never subject to the common law that, in the absence of proof as to the *lex loci contractus*, the court will apply the statute laws of the forum."

Consequently, the question arises to which class of States does Iowa belong? Is she a State in which the common law never prevailed before her admission into the Union, or is she one in which the common law was put in force, prior to her admission, by any statute or ordinance *of which we are to take judicial notice?* Here it might be readily taken for granted that, inasmuch as Iowa was a part of the Louisiana Purchase and was therefore under civil or French law, she was never under the common law prior to her admission. But the fact that she was under the French law while a part of the Louisiana Purchase is not material if the common law was, prior to her admission, put in force there *by any statute of which we are required to have judicial knowledge.* If it was, then we must take judicial notice that the common law was, by the passage of such ordinance or statute, put in force there at that time, and, having been once in force, that law is presumed to have remained in force until the contrary is shown. The case of Flato v. Mulhall, 72 Mo. 522, is not

Digitized by Google

contrary to but supports this rule. The court in that case held that judicial notice could not be taken of the laws of Texas; that as no proof of the Texas laws was offered, and as there was no basis for a presumption that the common law was ever in force there, the court could not presume that it was. At page 525, the court say: "If the common law ever prevailed there, or now prevails there, it must be *by virtue of some statutory provision of which we cannot take judicial notice.* As no evidence was introduced, *and no presumption can be indulged* as to the *lex loci contractus,* the law of the forum must govern." (Italics ours.)

So that if, as stated before, the common law was put in force in Iowa, prior to her admission, by any ordinance or statute of which we must take judicial notice, then that law is presumed to have remained in force until now, in the absence of any proof to the contrary.

An examination of the various laws and ordinances of Congress dealing with Iowa prior to her admission into the Union, and of the Territorial laws of Missouri when Iowa was a part of the Territory of Missouri will disclose that the common law was clearly established there by laws of which we are bound to take judicial knowledge.

These various Acts of Congress, which are all of a public nature, and the Territorial Laws of Missouri, are all within our judicial notice without proof. [1 Greenleaf on Evid. Sec. 490; 17 Am. & Eng. Ency. of Law (2 Ed.) 928; Mobile, etc. Ry. v. Bromberg, 37 So. Rep. l. c. 401; Missouri K. &. T. Ry. v. Wise, 109 S. W. 112; Overton v. McCabe, 109 S. W. 861; Perry v. Movis, 104 S. W. 571; Greene v. Boaz, 47 S. W. 255.]

After possession was taken of the Louisiana Purchase under the treaty with Napoleon and the Act of Congress of October 31, 1803, Congress, by an Act approved March 26, 1804, divided the Purchase into two territories and all north of the 33rd degree of north

Digitized by Google

latitude was called the District of Louisiana. This was changed to the Territory of Louisiana by Act of Congress approved March 3, 1805. The Act of Congress of June 4, 1812, changed the name thereof to the Territory of Missouri and made a number of provisions for its government. The territory of Missouri included what is now known as Iowa and the 14th Section of said Act of Congress of June 4, 1812, provided that: "The people of the said territory shall always be entitled to proportionate representation in the General Assembly; to judicial proceedings according to the common law and the laws and usages in force in the said territory." While the territory comprising what is now Iowa was still a part of the Missouri Territory, the Territorial Legislature of Missouri passed an Act January 20, 1816, Section 1 of which provided: "The common law of England, which is of a general nature, and all of the statutes of the British Parliament, in aid of, or to supply the defects of said common law, made prior to the fourth year of James First, and of a general nature, and not local to that kingdom, which said law and statutes are not contrary to the laws of this territory, and not repugnant to or inconsistent with the Constitution and laws of the United States, shall be the rule of decision of this territory until altered or repealed by the legislature." [Laws Mo. Territory, Dec. Sess. 1815, p. 32, Sec. 1.]

After Missouri became a State that part of the Territory of Missouri comprising what is now Iowa was by Act of Congress made a part of the Territory of Wisconsin. The Act of Congress of April 20, 1836, by which the Territory of Wisconsin was created, put in force the same system of laws in force under the Ordinance of 1787, approved July 13, 1787, governing the Northwest Territory, out of which Wisconsin was one of the five states carved. Article 2 of this Ordinance of 1787 provided that "The inhabitants of said Terri-

Digitized by Google

tory shall always be entitled to . . . judicial proceedings according to the course of the common law."

The Supreme Court of Illinois, in Penny v. Little, 3 Scammon (Ill.) 301, held that this provision meant the common law as it was then understood and expounded by the courts in America. And the fourth year of the reign of King James I was the year fixed for the transplanting of the common law into America because that was the period at which the first territorial government was established in America and with it the common law of England as it then existed. In Clark v. Clark, 18 Ind. 156, l. c. 158 it is said: "We know judicially that the common law was brought from England to this country by our ancestors and was declared for the government of the Territory of the Northwest . . . to be a part of the fundamental law of that territory." [See also Coburn v. Harvey, 18 Wis. 156; Stout v. Keyes, 2 Doug. (Mich.) 184; Forman v. Benson, 8 Mich. 18, l. c. 21; Crane v. Reeder, 21 Mich. 24, l. c. 61.]

Now on June 12, 1828, Congress by an Act of that date organized the Territory of Iowa, and Section 12 of said Act provided: "That the existing laws of the Territory of Wisconsin shall be extended over said territory subject to be altered, etc., by proper authority."

The Supreme Court of Iowa, in the case of O'Fallon v. Simplot, 4 Iowa, 381, l. c. 399, held that "the Ordinance of 1787 for the government of the Northwest Territory, made it (the common law) the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin over Iowa."

So that, we see that not only was the common law established over what is now Iowa by the Territorial Statute of Missouri of January 20, 1816, but that the common law was established over the Northwest Territory by the Ordinance of 1787; that, when Wisconsin was carved out of this Northwest Territory into the Territory of Wisconsin, the same law was put in force

Digitized by Google

there as was in force under the Ordinance of 1787; and that when what is now Iowa was put into the Territory of Wisconsin she not only carried the common law she had under the Territorial Legislative Act of Missouri, but she became subject to the common law already in force in Wisconsin; and when the Territory of Iowa was carved out of Wisconsin the same law existing in Wisconsin Territory was by Act of Congress extended over the Territory of Iowa. And all of this was done by Acts which we are bound to judicially notice. Hence the common law was established in Iowa long prior to its admission into the Union, and having been once established we must presume that it has continued in force to the present time, in the absence of any proof of the contrary. It follows, therefore, that, as the liability of the defendant must be determined according to the law of the place of the contract, and as the notes in suit are, in the absence of any statute, not negotiable, the proof offered in support of plaintiff's case was not sufficient and the demurrer should have been sustained. The judgment is, therefore, reversed and the cause remanded. All concur.

CATHERINE GOODE, Respondent, v. CENTRAL COAL & COKE CO., Appellant.

Kansas City Court of Appeals, April 6, 1914.

1. **PLEADING: Evidence: Failure of Proof.** A coal miner was killed by a rock falling from the roof of the mine. If he was killed at his working place, the mining company was not liable; if he was killed at a point not his working place, the company was liable. The petition alleged that he was killed at a point from fifteen to twenty-five feet away from his working place, while the proof tended to show that he was killed outside his working place but nearer to it than fifteen feet. It was held that this was not a failure of proof.

Digitized by Google

2. **INSTRUCTIONS: Omitting Issue.** A petition in an action for the death of a coal miner alleged that he was killed at a place which was not his working place. It was held to be error to give an instruction for the plaintiff omitting to submit whether the place he was killed was not the place where he worked.

3. **———: Question of Law.** It is error to submit a question of law to a jury as to what part of a coal mine the law cast a duty upon the operator to repair.

4. **ABSTRACT: Instructions: Counter Abstract: Affidavits.** If an appellant's abstract presents instructions as those given for respondent and the latter does not object to them by filing a counter abstract, they will be accepted by the appellate court as correct; and affidavits that they are not those given at the trial will not be considered.

Appeal from Macon Circuit Court—*Hon Nat. M. Shelton,* Judge.

REVERSED AND REMANDED.

B. R. Dysart and *W. C. Goodson* for appellant.

Dan R. Hughes and *Burns, Burns & Burns* for respondent

ELLISON, P. J.—Plaintiff's action is to recover damages for the death of her husband who was a miner engaged in mining coal for defendant. The judgment in the trial court was for the plaintiff.

This is the second appeal. The first is found reported in 167 Mo. App. 169 to which we refer for a general statement of the case. The petition charges that deceased while eating his noon lunch "at a point in the mine from fifteen to twenty-five feet north of his working place", was killed by a large and heavy rock falling from the roof upon him. The usual allegations of negligence were charged, in that defendant failed to support and protect the roof at that point.

Defendant demurred to the evidence in the trial court and insists here that it should have been sustained. It is conceded that if deceased was killed at

Digitized by Google

his working place, there can be no recovery, since it was his duty to look to the safety of the roof at such place. We have examined the testimony in detail and find, that while it may fairly be said to preponderate in favor of defendant's theory that deceased was killed at his working place, thereby exonerating it from blame, yet there was sufficient evidence to the contrary to justify the trial court in leaving the question to the jury, and so we held when the case was here the first time.

Much of defendant's argument as to failure of plaintiff's proof has been based on the idea that she was compelled literally to sustain the allegation in her petition that deceased was killed between fifteen and twenty-five feet from his working place. There is no good reason for this. The substantial point of controversy was whether deceased was killed away from his working place, where defendant would be liable for the condition of the roof; or, at his working place, where he was supposed to look out for himself and it would not be liable. If he was not at his working place when killed, it is of no consequence whether he was five feet or twenty feet away. It is true that when one specializes in his petition he should be particular in his proof. But that rule refers to the substance of the charge and not to matters of no consequence which could not affect the meaning of what is alleged. If the exact distance affected defendant's liability on the main charge, then it would be proper enough to require proof of plaintiff's specification.

Plaintiff's instructions numbers 2 and 3 are erroneous. The former submits the hypothesis that deceased "was struck by a large slab of rock falling from the roof and side of one of the entries of said mine because of the negligence of the defendant," etc., but omits to submit that it was not his working place. Thus omitting the main controversy between the parties.

Digitized by Google

The other instruction submitted to the jury that if they found from the evidence "deceased was killed in that part of the entry in which it was the duty of the defendant company to keep the roof in repair and that defendant failed," etc. There was thus left to the jury to say what part of the roof the law cast the duty upon defendant to repair. No other instruction defined such duty. The instruction should have stated the place so as to hold the jury to a decision whether he was, or was not, killed at a point which was not his working place. This was the sharply contested issue of the trial.

But plaintiff insists that these were not the instructions given at the trial and has filed affidavits in this court to that effect, and has objected to them in her brief. The instructions appear regularly and properly in defendant's abstract of the record. Plaintiff challenged its correctness as to some evidence and filed an additional abstract, setting out that evidence; but she did not question the instructions and we must therefore accept them as the record. The statute (Sec. 2048 R. S. 1909) clearly points out that if an appellant's abstract is not satisfactory to the respondent the latter shall file an additional abstract. If this is not accepted by the appellant he must specify his objection in writing and the original record will be ordered up for inspection by the court.

The judgment is reversed and the cause is remanded. All concur.

Digitized by Google

JOHN Q. ROBINSON, Respondent, v. KANSAS CITY, MISSOURI, and THE PARKER-WASHINGTON COMPANY, Appellants.

Kansas City Court of Appeals, April 6, 1914.

1. **NEGLIGENCE: Municipal Corporations: Embankments.** The plaintiff sued the defendants to recover for personal injuries sustained by his wife, caused by the negligence of the defendants in failing to guard an embankment and excavation in a public street which had been recently graded. The plaintiff's wife going home from a grocery store, in the dark, fell down the embankment, which was in its natural state, and was injured. *Held*, that a city is under no duty to travelers to fence off or otherwise guard portions of streets left in a state of nature.

2. ———: ———: ———. A city lawfully exercised its governmental discretion to grade and prepare for use only the wagon roadway in part of the street. It is not required to grade and improve the whole space and build sidewalks on it, and therefore is not liable for not having done so.

Appeal from the Jackson Circuit Court.—*Hon. W. O. Thomas*, Judge.

REVERSED.

A. F. Evans, Jas. W. Garner, Hunt C. Moore and *Ball & Ryland* for appellants.

Botsford, Deatherage & Creason for respondent.

JOHNSON, J.—Plaintiff sued to recover damages he sustained in consequence of personal injuries to his wife which he alleges were caused by negligence of defendants in failing to guard an embankment and excavation in one of the public streets of Kansas City which had been recently graded by the defendant The Parker-Washington Company under contract with the defendant city. Separate answers were filed, each con-

Digitized by Google

taining a general denial and a plea of contributory negligence. At the close of plaintiff's evidence the court sustained demurrers to the evidence offered by the respective defendants whereupon plaintiff took an involuntary nonsuit and afterward the court sustained his motion to set it aside and ordered a new trial. Both defendants appealed.

The injury occurred about eight o'clock p. m., November 3, 1906, at the intersection of Brighton avenue and Twenty-third street, a locality in a remote residence district of the city. Brighton avenue runs north and south, Twenty-third street, east and west, the platted width of the latter street being sixty feet. There were numerous residences in the vicinity, but neither street had been graded until several months before the date of the injury when the city had caused Brighton avenue to be graded to the established grade from Twenty-third street south. The established grade at the intersection was six feet below the natural surface, and the contractor had extended the grading far enough into the intersection to enable him to cut a narrow approach in Twenty-third street to the crossing. Shortly after this work was done, the city let the contract to The Parker-Washington Company to grade Brighton avenue north from Twenty-third to Twentieth street to the established grade. The contract contained the provision: "Approaches to all intersecting streets and alleys shall be graded under this contract whenever and in whatever manner indicated by the engineer, and they shall be measured and estimated as a part of and in the same manner as the roadway grading." This contract had been nearly, if not entirely, performed by the contractor on the date in question and under the direction of the engineer the cut for the approaches on Twenty-third street had been widened to about twenty feet and was in the middle of that street. South of this cut the ground was not graded and from the southeast corner of the intersec-

Digitized by Google

tion of the east cut with Brighton avenue (which had been graded to its full width) a strip of ground fifteen to twenty feet wide had been left in Twenty-third street. This strip, which was on a level with the adjoining property, ended at Brighton avenue in an abrupt bank six feet high and was bounded on the north by a bank facing the cut in Twenty-third street. There was a building occupied by a grocer at the southeast corner of the platted intersection. It fronted on Brighton avenue and had been built on a surface grade. The grading of the avenue left its first floor six feet higher than the street and between the north wall and the cut in Twenty-third street was the strip of untouched ground we have described, which, of course, was within the bounds of that street as platted and dedicated. The entrance to the store was at the northwest corner which had been recessed so that the door faced northwest and was at the base line of a small triangular platform within the lines of the recess. The west and north walls of the building were on property lines and no steps or means of ingress and egress were provided by the grocer for the use of his patrons and other invitees. The grading of the streets had compelled those who sought the store to walk up the embankment facing Brighton avenue and a sinuous path about two feet wide led from near the sidewalk on Brighton to the triangular platform. Owing to erosions of the bank the end of the path was in Twenty-third street, a foot or two east of the avenue and on a line, perhaps five or six feet north of the corner of the entrance platform.

Plaintiff and his wife living a block north on Twenty-second street first visited a drug store at the corner of Twenty-fourth street and Brighton avenue, and then proceeded to the grocery store where they made some purchases. In leaving the store plaintiff came first, carrying a number of bundles, and proceeded down the path, followed by his wife who was some dis-

Digitized by Google

tance behind. The night was dark and the electric lamp at the corner was not burning. Mrs. Robinson left the path and fell down the bank near the intersection of the cut on Twenty-third street with Brighton avenue.

We have stated only such facts as are necessary to the view we have of the case and have not attempted to be accurate in such details as distances and measurements. For example, we have said that the strip of ground in the street on the south side of the cut in Twenty-third street was fifteen or twenty feet wide, since the cut was in the middle of a platted street sixty feet wide and itself was twenty or twenty-five feet wide. But in our view of the case it is immaterial whether this strip was twenty or only six feet wide, or whether the path to the store began in Brighton avenue or Twenty-third street. The controlling and all-important fact of the case is that Mrs. Robinson was injured, not while using a part of a public street the city had invited her to use, but while on a part the city had left in a state of nature and, therefore, had not thrown open to the use of the public. A city's duty towards persons using its public streets springs from invitation, express or implied, and unless the city does something from which such invitation reasonably may be implied, it cannot be said to have assumed any duty towards the public with respect to merely platted or dedicated streets. The city had a right to prepare a way only twenty feet wide in the middle of a dedicated street of sixty feet, without assuming any duty or liability with respect to the portions of the street left in a state of nature. [Curran v. St. Joseph, 143 Mo. App. 618; Conner v. Nevada, 188 Mo. 148; Downend v. Kansas City, 71 Mo. App. 529; Ely v. St. Louis, 181 Mo. 723.] In the last case cited it is said: "The city lawfully exercised its governmental discretion to grade and prepare for use only the wagon roadway in part of the street; it was not required to grade and improve the

Digitized by Google

whole eighty-foot space and build sidewalks on it, and therefore is not liable for not having done so. The path through the weeds and over the uneven surface spoke for itself and told everyone that there was no sidewalk there and it invited no one to use it at the city's expense. The city was not responsible for the condition of that path and therefore it will not be necessary to decide whether by the plaintiff's own evidence he was negligent in travelling the path under the circumstances."

So in the present instance the bank spoke for itself and told plaintiff and his wife that it was a part of the street the city did not invite them to use and which, so far as the city and its contractor were concerned, they would go upon at their own risk of injury. A city is under no duty to travelers to fence off or otherwise guard portions of streets thus left in a state of nature.

The demurrers to the evidence were properly sustained and the court erred in granting a new trial.

Reversed. All concur.

JAMES RONCHETTO, Respondent, v. NORTHERN CENTRAL COAL COMPANY, Appellant.

Kansas City Court of Appeals, April 6, 1914.

1. **NEGLIGENCE: Mines and Mining: Cages.** The plaintiff, a coal miner, sued to recover for personal injuries sustained, while being hoisted to the top of defendant's coal mine. The plaintiff, with five other miners, was being hoisted to the top of the shaft after their day's labor, when the hoist, which was in a defective condition, dumped the plaintiff out and he was injured. *Held*, that the plaintiff's injury was the direct result of a negligent breach of duty, which the defendant owed him.

2. **EVIDENCE: Error: Refusal to Answer.** A mere refusal of the trial court to hear an answer is not alone sufficient to con-

Digitized by Google

stitute error, but it is the duty of the party alleging error to indicate what the evidence is which he proposes to elicit.

3. **MINES AND MINING: Statutes.** Under Sec. 8456, R. S. 1909, it is the duty of owner or operator of a mine "to provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft."

4. **———: Knowledge of Defects.** Knowledge, actual or constructive, of a defect in appliances must be brought home to the employer before a liability exists.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller,* Judge.

AFFIRMED.

Willard P. Cave for appellant.

Dan R. Hughes, John R. Hughes and *Hunter & Chamier* for respondent.

JOHNSON, J.—Plaintiff, a coal miner employed by defendant fell from a hoisting cage in which he was being lifted to the top of the mine and sustained personal injuries he alleges were caused by negligence of defendant. The averment of negligence in the petition is that defendant "negligently and carelessly failed to inspect said cages, and negligently and carelessly failed to repair them, and negligently and carelessly permitted said cages to remain in a loose, unsafe, dangerous and defective condition, and imperilling the lives and limbs of the employees employed in said mine while riding upon said cages . . . that by reason of the carelessness and negligence of defendant . . . in its failure to inspect, to keep in repair and to maintain its cages in a reasonably safe condition, he was injured," etc.

The answer is a general denial followed by pleas of assumed risk and contributory negligence. The

Digitized by Google

cause is here on the appeal of defendant from a judgment for $2500 recovered by plaintiff in the circuit court.

The principal contention of counsel for defendant is that the demurrer requested by him at the close of plaintiff's evidence, and afterward at the close of all the evidence, should have been given.

The injury occurred at 3:30 p. m., November 8, 1911, in the main shaft of defendant's "Mine No. 2" at Huntsville. Two hundred miners were employed in this mine and a double compartment hoist operated by a steam engine was used to carry them to and from the mine and to carry coal to the tipple at the top of the shaft. The two elevators or cages, as they are called by the witnesses, were covered with sheet iron and each had its floor constructed in a manner to permit the automatic dumping of each load of coal into a hopper at the top of the shaft, but to be firmly fixed in a horizontal position while the cage traveled up and down the shaft. Plaintiff and five other miners, having finished their work for the day, entered the north cage for transportation to the top, and plaintiff stood on the southwest corner of the cage floor which was hinged to the cage on the east side but detached on its other sides to allow it to swing downward and open towards the west in the dumping process. After the cager whose post was at the bottom of the shaft had given the signals to the engineer, apprising him that men and not coal were to be carried, the cage began its ascent at a speed requiring from twelve to fifteen seconds to reach the top of the shaft which was 77 feet deep. During the ascent, plaintiff fell out of the cage into the sump at the bottom which was covered with six or eight inches of water. From the top of the shaft down to a point about ten feet above the bottom, the shaft was boxed or curbed with heavy oak boards and this boxing rested upon a ring of heavy timbers called "the ring set." There was no boxing below the ring set. The

Digitized by Google

theory of the cause of plaintiff's fall urged by counsel for defendant is that he stood too near the entrance to the cage and in going upward his head, projecting beyond the inner side of the boxing, collided with the west timber of the ring set and he was caused to fall in the space between the cage floor and the wall of the shaft below the ring set. The contention of plaintiff is that he rode in safety until after the cage had passed the ring set and was entirely in the boxing and that his fall was caused by the sudden dumping of the floor which returned almost immediately afterward to a horizontal plane. No other occupant of the car was thrown therefrom but all testified that the floor did drop down at the west side a sufficient distance to admit the passage of plaintiff's body. They raised a great clamor by shouting and striking their lunch pails against the cage and the engineer stopped the cage when it was about midway in its ascent, but after it was known that plaintiff had fallen into the sump the cage was hoisted to the top without further misadventure. The floor of the cage rested on the dumping mechanism which, in turn, was supported by heavy timbers called the sills of the car. The sill on the east side sustained the principal shock and stress of the dumping process and was covered by an iron strap to protect the wood from wearing away under the blows of the "knuckle." This strap was bolted at each end to the sill and the evidence of plaintiff tends to show that the bolt at the north end had worked out and that the released end of the strap had worked around towards the east, to an extent to cause it to touch and drag along the boxing, while the other end remained firmly bolted to the sill. The men in the car testified that from the moment it entered the boxing they could hear the sound of metal scraping on wood and that the strap seemed to catch in the wood at the instant the floor dumped. It is not seriously contended that plaintiff did not fall from a much greater height than the ring

Digitized by Google

set and that the cage had passed entirely within the boxing, but defendant, in support of its theory of the cause of his fall, points to the facts that no one saw him when he pitched headlong into the shaft and that some of the occupants of the car did discover his plight at the moment when, as one of them states, "his foot was hanging on the cage between the cage and the curbing; his body was down and he had his foot hanging there." It is argued from this evidence that in falling, in consequence of a blow from the ring set timber, his foot and ankle were caught as the floor of the car ascended past the ring set and as the east and west dimension of the shaft inside the boxing was only about three inches greater than the width of the car floor, he was dragged upward by the foot a distance of fifteen or twenty feet until his foot became disengaged and he plunged to the bottom. Expert witnesses for defendant testified that the floor could not have dumped inside the boxing owing to the lack of room for such operation which required a movement of the floor westward a distance of twelve or fifteen inches beyond the line of the curbing and further state that the loosened iron strap could not have had any effect upon the dumping apparatus.

We are asked by counsel for defendant to accept this evidence as conclusive and to declare as a matter of law the physical impossibility of there being any causal relation between the loosened and displaced strap and the fall of plaintiff. The evidence of plaintiff tends to show that the walls of the curbing had been allowed to become uneven and irregular so that at some places the well was six inches or more wider than the cage and there is room for a reasonable inference that such space would permit the floor to be partially dumped. Further it is shown that the perpendicular guides for the car had become out of line in places, permitting the cage to sway from one side of the shaft to the other. In addition to the facts men-

Digitized by Google

tioned, i. e., that the strap bolt was gone, that the strap was heard and felt to scrape along the east wall of the boxing and finally seemed to catch in the wood, and that all of the men on the car state that the floor did dump, we find evidence to the effect that large lumps of coal had fallen during prior ascents of that cage and that such things could not have occurred without partial dumping of the floor. Further, the theory of defendants is met by the inharmonious fact that the many serious and painful injuries inflicted on plaintiff were upon his sides and back, and that his head and feet escaped all but trifling injuries—a result one would not expect from a terrific blow on the head, followed by the dragging and crushing of his foot and ankle between the heavy car and the timbers of the shaft.

After the cage reached the top and the miners alighted, it was lowered to the bottom and plaintiff was placed in it and carried to the top. There is evidence tending to show that the cage was continued in use without repairs and much stress is laid on this evidence in defendant's argument that the loosened strap did not and could not have caused the injury. Complaint is made by counsel for defendant of a ruling of the court which he claims prevented him from showing on cross-examination of one of plaintiff's witnesses that the cage had been continued in safe use after the injury, and the rule is invoked that "evidence that the machine which caused the accident was in good condition at the time of the trial and at other times shortly before and after the accident, and that it worked properly before and after the accident is admissible as having a tendency to show its condition and how it worked at the time of the accident. Such evidence may even be conclusive in the master's favor." [4 LaBatt on Master & Servant, 4829.] This rule may be conceded and the relevancy of the question the court refused to permit the witness to answer also may be acknowl-

Digitized by Google

edged but it does not follow from these concessions that the adverse ruling necessarily constituted reversible error. The question which was asked at an early stage of the trial was, "And that cage has been in use?" Counsel for plaintiff objected on the ground that the question "is improper. They may have fixed it (the cage) since that time and it may not be the same cage." The objection was sustained and counsel for defendant merely saved an exception without indicating in any manner the nature of the proof he purposed making and to which the question was addressed.

As was said by the Supreme Court in State v. Arnold, 206 Mo. l. c. 597, and by this court in Bowman v. Mining Company, 168 Mo. App. l. c. 707: "A mere refusal to hear an answer is not alone sufficient to constitute error, but it is the duty of the party alleging error to indicate what the evidence is which he proposes to elicit."

This rule is especially applicable in instances, such as the present, where the particular fact to which the question relates may or may not be endowed with probative value. The fact alone that the cage had been continued in use would tend to prove nothing unless coupled with additional proof that its condition had not been altered and that such subsequent use had been successful and reasonably safe. At the time of the ruling in question no such proof had been introduced and without any intimation that it would be forthcoming, the court was justified in assuming that the question was directed merely to an isolated fact of no evidentiary significance. This assignment of error must be ruled against defendant.

Passing to a consideration of the demurrer, we find the evidence of plaintiff relating to the cause of the injury is reasonable and substantial and should not be denounced in law as opposed to the conceded physical facts of the situation. That plaintiff fell from the car after it had passed the ring set is a fact about

Digitized by Google

which there is little room for controversy. He stood at the western or opening side of the floor and there is only one possible way in which he could have been removed from the car after it had passed the ring set, i. e., by the opening of the floor a sufficient space to admit the passage of his body between its edge and the curbing. Without such dropping of the floor the space between it and the wall could not have been over six inches, a distance too narrow to allow the passage of the body of a man. The theory of defendant that plaintiff's head collided with the ring set and that he was dragged upward by the foot is too unreasonable to receive much consideration, in view of the absence of serious injury to his head and feet. Instead of being opposed to physical facts, the testimony of plaintiff and his witnesses that he did not fall until the cage had passed the ring set is the only view of the injury that may be reconciled with them, as is also their assertion that a partial dumping of the floor was the cause of his fall.

The testimony of defendant's experts that the floor could not have dumped is met by the stubborn fact that it did dump, and when analyzed, is found to be predicated of a state of facts which the evidence of plaintiff shows was nonexistent. If it had been indisputably shown that the guides were in proper alignment, that the walls of the enclosure were regular and of even surface, and that not over an inch or an inch and a half of play was allowed the cage on each side, the opinion of these experts would appear to be well-founded; but under the hypothesis that the guides were out of line, that the walls had become irregular and uneven, so that at times the cage would be in a place where it would have as much as six inches of play, we think the jury were entitled to infer that the floor could be partially dumped by the force engendered by the catching of the projecting strap on the boxing it was scraping. Nor may such conclusion be held to

Digitized by Google

be disproved by the evidence that the cage was continued in use without a repetition of such an incident. In the first place, it is not conclusively shown that the defect was not repaired. We are not bound by the testimony of defendant's witnesses on that point and their credibility and the reasonableness of their testimony are issues of fact for the jury to determine. And if not repaired the fact that the strap which had mobility in some degree did not continue to scrape along the wall might indicate nothing more than that the loose end had been shifted back to a different and less dangerous position. Certainly it cannot be said to refute conclusively the testimony of so many apparently credible witnesses.

In the statutes pertaining to mines and safety of miners (Sec. 8456, R. S. 1909) it is made the duty of the owner or operator "to provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." So far as the purposes of the present inquiry are concerned, this provision may be regarded as a statutory expression of an elementary common law rule. Having provided a hoisting cage for the transportation of its miners, it was the duty of defendant to exercise reasonable care to maintain the cage in a reasonably safe condition for use. Defendant was not an insurer of the safety of plaintiff and the mere fact that plaintiff was injured while in the discharge of the duties of his employment by a defect in the cage would not, of itself, raise an inference of negligence. The question is whether or not defendant exercised proper care to discover the presence of defects in the cage that would enhance the natural risks of the service. Knowledge, actual or constructive, of a defect in appliances must be brought home to the employer before a liability exists. [3 LaBatt on Master & Servant, 1027; Wojtylak v. Coal Co., 188 Mo. 260; Glasscock v. Swofford, 106

Digitized by Google

Mo. App. 657; Kramer v. Manufacturing Co., 120 Mo. App. 247.]

We hold the evidence of plaintiff is sufficient to support an inference that the injury was caused by negligence of defendant in the inspection of the cage or in failing to repair the defect after its discovery. Reference to a single incident will suffice to show that the bolt must have been gone for a long time and that the strap had been scraping the floor and causing it to dump. The testimony of the cager, who was in a position to know, that large lumps of coal had been falling from the ascending cage for quite a long period is compatible with no other conclusion than that the same cause that dumped the floor to the injury of plaintiff had been in operation and was manifested by results which could follow only from a partial dumping of the floor. The jury were entitled to the inference that the exercise of reasonable care by defendant would have resulted in the discovery and repair of the defect.

We conclude that the evidence of plaintiff discloses that his injury was the direct result of a negligent breach of such duty. The demurrer to the evidence was properly overruled.

We have sufficiently answered objections to the instructions in what we have said. The case was tried without prejudicial error.

Affirmed. All concur.

Digitized by Google

ANDREW J. STARK, Jr., by his guardian ANDREW J. STARK, Respondent, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, UNITED STATES EXPRESS COMPANY and RALPH ORCUTT, Defendants. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, April 6, 1914.

1. **NEGLIGENCE: Railroads: Trucks: Invitees.** A boy, 14 years old, while waiting on a railway station platform, for his father, who was expected to arrive on an incoming train, leaned against a station freight truck, which was loaded with sacked flour, and it tipped down to the floor catching and breaking his leg. The truck had been provided at each end with a short leg ending in a small wheel, but one of these legs had been broken off two or three months before, leaving that end without support. *Held*, that the defendant failed to maintain its station platform in a reasonably safe condition.

2. ———: ———: ———. A person has a right to go on a station platform for the purpose of escorting an outgoing passenger or meeting one whose arrival is expected. To such a person the railroad company does not owe the extraordinary care it owes a passenger, but does owe him the duty of ordinary care to mainitain its station building and platform in a reasonably safe condition.

Appeal from DeKalb Circuit Court.—*Hon. A. D. Burnes,* Judge.

AFFIRMED.

John E. Dolman and *R. A. Hewitt* for appellant.

E. G. Robison and *Kendall B. Randolph* for respondent.

JOHNSON, J.—Plaintiff, by his guardian, sued defendant for injuries received by a loaded truck fall-

Digitized by Google

ing upon him while he was waiting on defendant's station platform at Amity for the arrival of a train. A trial by jury resulted in a verdict and judgment for plaintiff and defendant railroad company appealed. The main question for our decision is whether or not the verdict is supported by sufficient evidence. Plaintiff was fourteen years old and lived with his parents at Amity, a short distance from, and in sight of, defendant's station. Late in the afternoon of January 6, 1911, he went to the station to meet his father who was expected to arrive at the station on a freight train from the east. A large truck kept by defendant at the station for the movement of freight and baggage was standing in a prominent place on the platform. Earlier in the day, a merchant had loaded the truck with two wagonloads of sacked flour for shipment on the train for which plaintiff was waiting. The platform of the truck was twelve feet long and was supported by two large wheels in the center. It had been provided at each end with a short leg ending in a small wheel but one of these legs had been broken off sometime before, leaving that end of the truck without support. The sacks of flour covered the top of the truck and the load was so evenly distributed that it required a pressure of only fifteen or twenty pounds to cause the unsupported end to sink down to the floor. While waiting for the train, plaintiff lounged against that end of the truck and it tipped down to the floor, catching and breaking his leg. The defect had existed two or three months but the truck had been continued in service on that platform which was provided for the use of passengers and others having business with defendant. The station agent received the shipment from the merchant and we think had knowledge that the flour was loaded on the crippled truck, preparatory to shipment.

The burden is on plaintiff to show that his injury was caused by negligence of defendant, i. e., by the

Digitized by Google

culpable neglect of some duty defendant owed him and it is the contention of counsel for defendant that it owed him no duty to provide a truck for him to lean against. In other words, that the truck itself proclaimed to persons rightfully using the station platform on the express or implied invitation of defendant that it was designed for use only in the transportation of freight, baggage and express, and not as a seat or resting device for such invitees.

Plaintiff was using the station platform on the implied invitation of defendant and was neither a trespasser nor a mere licensee. As we observed in the recent case of Winscott v. Railroad, 151 Mo. App. l. c. 381, a person has a right to go on station premises for the purpose of escorting an outgoing passenger or of meeting one whose arrival is expected. To such a person the railroad company does not owe the extraordinary care it owes a passenger, but does owe him the duty of ordinary care to maintain its station buildings and platforms in a reasonably safe condition for such use. [Doss v. Railway, 59 Mo. 27; Langan v. Railway, 72 Mo. 392; James v. Railroad, 107 Mo. 480; Railroad v. Best, 66 Tex. 116; Gillis v. Railroad, 59 Pa. St. 129.] The duty of defendant towards plaintiff was to exercise reasonable care to maintain the station platform it had provided for the use of patrons in a reasonably safe condition and it cannot be said that such duty would be discharged if defendant maintained concealed traps or pitfalls on the platform in places where its unwary invitees might be expected to become ensnared and injured by them, and it would be a strange doctrine that would excuse defendant from liability on the specious argument that the invitee should have kept away from the trap because it was not designed or intended for his use or convenience. While the truck, obviously, was not intended to be used as a seat or resting place, defendant was bound to anticipate that per-

Digitized by Google

sons doomed to the wearisome task of waiting for a train at a country station might lean against, or even sit upon, so convenient an object as a platform truck. In the performance of its duty, defendant was required by law to take into consideration common human habits and customs, and had no right to place its invitees in a situation where they would have to be on the alert to protect themselves from injury. A place is not reasonably safe if it compels one to put a guard over his every action to keep from falling into some trap or snare.

The cases cited by defendant which relate to the proper use of fences, banisters and similar barriers in public or private passageways, e. g., Kelley v. Lawrence, 195 Mo. 75; Stickney v. City of Salem, 3 Allen, 374; Orcutt v. Bridge Co., 53 Me. 500; Kinney v. Onstead, 113 Mich. 96, are not in point. As was said in Winscott v. Railroad, supra, we are not dealing with a case where the plaintiff, traveling on a way prepared only for travel and intended to be used for no other purpose, is injured on account of another use he makes of the place, but with an instance where the plaintiff is injured while using the place for the very purpose for which it was intended and prepared. Plaintiff's business was that of waiting, in a place provided by defendant for that particular use and it was not to be expected that he would stand in one particular spot for fear of moving, or that he would regard every object on the platform that offered some means of rest or relaxation as being loaded with concealed danger. He had the right to assume that a truck loaded with freight was not a hair-trigger trap that would go off and kill or maim him if he but casually touched or leaned against it. The evidence of plaintiff tends to show that a negligent breach by defendant of its duty to exercise proper care to maintain the station platform in a reasonably safe condition was the proximate

Digitized by Google

cause of his injury. The demurrer to the evidence was properly overruled.

The objection urged against an instruction given at the request of plaintiff is not well taken. The judgment is affirmed.

Trimble, J., concurs; *Ellison, P. J.*, dissents.

RACKLIFFE-GIBSON CONSTRUCTION COMPANY, a corporation, Respondent, v. ZEILDA FORSEE INVESTMENT COMPANY, a corporation, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **TAX-BILLS: Assessments: Frontage on Streets.** The plaintiff sued to enforce the lien of a special tax-bill against the land of the defendants. The defendants' land did abut on the street, which was paved, but only to the extent of a very small proportion, seventeen feet, of a large tract which was all taxed for the improvement. *Held*, that our statutes do not contemplate the division for the purposes of a special assessment, of single lots or parcels of land, but the whole tract in so far as it lies within the area of the assessment is subject to the assessment, if any portion of it abuts upon the street where the improvement is made.

2. **DEFINITIONS: Frontage.** The term "frontage" is but an expression of the front foot rule and under such rule no other property than that abutting on the street improved can be assessed.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

AFFIRMED.

Brown & Eastin for appellant.

Frank B. Fulkerson, Joshua A. Graham and *Hugh C. Smith* for respondent.

Digitized by Google

JOHNSON, J.—This is an action to enforce the lien of a special tax bill issued by the city of St. Joseph for the paving of Twenty-second street, under an ordinance duly passed for that purpose. The street runs north and south and the land owned by defendant against which the tax bill was issued consisted of an irregular, unplatted tract or parcel of land, the body of which was 1017 feet, nine inches long, from north to south, and of an average width of about 400 feet. The whole of the tract was west of Twenty-second street and all of it except a narrow strip we shall describe was separated from the street a distance of 224 feet by an intermediate tract not owned by defendant and known as the Huggins Terrace, which was 990 feet long and 224 feet wide. The strip just mentioned, which was seventeen feet, nine inches wide, bounded the Huggins Terrace on the north and connected the body of defendant's tract with Twenty-second street, having a frontage of seventeen feet, nine inches on that street. Had the described lands been platted the strip would have constituted a part of Marion street, an east and west street, but neither the Huggins Terrace nor defendant's land was platted at the time of the improvement and the issuance of the tax bill. The north end of the improvement as fixed in the ordinance was opposite the north boundary line of defendant's land. Sometime after the tax bill was issued defendant platted the whole tract and the city accepted the dedication of the streets and alleys as shown on the recorded plat. The whole of the strip was included in the land platted and dedicated as Marion street.

The defense to the tax bill is that its lien could not be extended south of the narrow strip abutting on the street, i. e., a strip seventeen feet, nine inches wide off of the north end of defendant's tract and since that strip has been dedicated to public use, the lien has failed entirely, at least, as far as the land retained by defendant is concerned.

Digitized by Google

As stated by counsel for defendant "the sole question raised at the trial was whether or not the plaintiff could have a lien against a large tract of land situated as the tract described in the tax bill simply because a strip seventeen feet, nine inches wide extended like an arm out to, and bordered upon, the street." In their brief and argument counsel advance the proposition that "only that portion of the land abutting upon Twenty-second street can be subjected to the tax," and apply this rule in a way to restrict an assessment against a lot, tract or parcel of land to an area of no greater width than that of the frontage of such lot or tract on the improved street.

The pertinent statutes provide "the cost of all work on streets . . . shall be charged as a special tax on lands on both sides of an adjoining street" (Sec. 8709, R. S. 1909) and "when any work . . . shall be completed under authority herein granted, the city engineer shall compute the cost thereof and apportion the same among the several lots or parcels of land to be charged therewith and charge each lot or parcel of property with its proper share of such costs according to the frontage of the property." [Sec. 8710.]

As we said in Chillicothe v. Henry, 136 Mo. App. l. c. 472, the term "frontage" is but an expression of the "front foot rule" and under such rule no other property than that abutting on the street improved can be assessed. But where a lot or parcel of land has a frontage on the improvement, the quoted language of the statutes would seem to contemplate that the whole lot or parcel should be subject to assessment in the proportion of its frontage on the street. Each lot or parcel so abutting is treated as an assessable unit or entity and no statutory provision is made for the subdivision of such units to meet the exigencies of particular cases. The right of municipalities to assess private property to pay the costs of public street

Digitized by Google

improvements is purely statutory, as is also the method and procedure for making an apportionment of the burden. The statutes must be strictly construed and implied provisions inconsistent with those expressed could not be read into them by the courts without invading the province of the Legislature. Large as it was, the whole tract owned by defendant was but a single parcel—a taxable entity—and it was enough to subject it to an assessment that it stretched out an arm which ended in a street frontage. So far as we are advised or have been able to ascertain the point is new in this State and the only cited authority in other jurisdictions which may be said to touch the precise question is the case of Bishop v. Tripp, 8 Atl. 692. In that case the Supreme Court of Rhode Island said of an instance where only a portion of the land assessed abutted on the street, the rest being separated from the street by the land of another person, "We think the correct construction of the several statutes relating to the subject is that the entire estate, insofar as it lies within the area of the assessment, is subject to assessment, if any portion of it abuts upon the street where the sewer is laid, though of course only the abutting portion is subject to assessment for frontage."

The case of Ryan v. Sumner, 17 Wash. 228, relied upon by defendant, presented a different situation from that in the present case. There a forty-acre tract abutted on a street which was improved less than half the distance of the whole frontage. The Supreme Court of Washington held that "the estimate of the benefits and assessment must be confined to that portion of the land fronting on the improvement," doubtless for the reason that the remainder of the land would be subject in the future to assessment for the cost of extending the improvement the entire length of the frontage. It must be admitted that the decision does not treat a single parcel of land abutting upon the improvement as an assessable unit and since it contains

Digitized by Google

no reference to the pertinent statutes and they are not before us we have no means of knowing that the rule pronounced was not authorized by the statutory law of that State.

Our own statutes, as we have observed, do not contemplate the division for the purposes of such special assessment of single lots or parcels of land, and we are bound to enforce the statutory law as we find it. We agree with the learned judge who tried the case that the tax bill was properly issued against the entire tract.

The judgment is affirmed. All concur.

ANNIE WILLIS, Respondent, v. CITY OF BROWNING, Appellant.

Kansas City Court of Appeals, May 4, 1914.

NEGLIGENCE: Municipal Corporations: Sidewalks. The plaintiff sued to recover for personal injuries sustained through the negligence of the defendant city. The plaintiff was crossing the street of the defendant city on a wooden crossing, when her foot went through the plank and she was injured. *Held*, that the instructions fairly presented the only real issue of fact in the case and there is no room for the thought that the jury did not understand the issue and address themselves to its solution.

Appeal from Macon Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

AFFIRMED.

E. B. Fields and *Dan R. Hughes* for appellant.

D. M. Wilson, J. W Clapp, Paul Prosser and *Guthrie & Franklin* for respondent.

Digitized by Google

JOHNSON, J.—This is a negligence suit begun in Linn county and on change of venue removed to Livingston where a trial ended in a verdict and judgment for plaintiff for $5,000. On appeal we reversed the judgment and remanded the cause for error of the court in allowing plaintiff to make a demonstration before the jury to convince them of the need she still had for crutches. [161 Mo. App. 461.] We held the evidence of plaintiff supported her pleaded cause and afforded no room for an inference of contributory negligence in law. After the cause was sent back to the circuit court a second change of venue was granted to Macon county. An amended petition was filed in which, in addition to the charge that the crossing board on which plaintiff stepped was rotten and broke under her weight, it was alleged "or plaintiff stepped in a hole in said crossing which said hole had negligently been permitted to remain in said crossing for a long period of time." The answer was a general denial. The second trial resulted in a verdict and judgment for plaintiff for $1,200 and after its motions for a new trial and in arrest were overruled, defendant again appealed.

We find no substantial difference in the evidence introduced at the two trials. The proof of plaintiff is to the effect that a board crossing maintained by defendant over one of its public streets had been suffered to fall into such condition of decay that it became unsafe and that while she was attempting to cross the street one of the boards broke under her weight and her foot went through to the bottom of a drain under the crossing. The evidence of defendant tends to show that she was not injured in such manner but accidentally stepped into a post hole in her own back yard and further that she has magnified her physical injuries to swell her apocryphal claim for damages. Counsel for defendant repeat the argument they made on the former appeal that the verdict was so clearly

Digitized by Google

against the weight of the evidence that we should regard it as the product of passion and prejudice, but we must reject this argument as we did before. There is no inherent weakness in the version of the injury given by plaintiff and her witnesses. She states her foot broke through a certain board and other witnesses who looked at the place testified to the presence of a freshly made hole at that place. A greater number of apparently disinterested witnesses introduced by defendent testified that there was no new hole in the crossing at or near that place and that the boards were found to be in the same condition after the injury as they were before. The question for our consideration is not that of the weight of the evidence but whether the evidence of the plaintiff is too weak to raise a debatable issue of fact in the minds of reasonable men. The issues of the credibility of witnesses and of the weight to be given their testimony always are for the jury to determine, except in instances where their testimony is so inherently weak and unreasonable that reasonable minds could not entertain different opinions about it. Though a greater number of witnesses say the crossing was eight boards wide instead of four, as stated by plaintiff and her witnesses and that the board through which she states her foot penetrated showed no signs of such mishap, we are in no position to declare that her evidence must be false. The duty of deciding such controversies is vested by law in the triers of fact and since they have decided them in favor of plaintiff we are without the power and, we may add, the inclination, to interfere.

The conflict between the parties over the fact of whether the crossing consisted of four boards or eight, coupled with the new allegation in the petition as amended, furnished the ground for objections urged to the rulings on the instructions which we regard as too technical for extended discussion. The clear-cut

Digitized by Google

issue in the case is whether plaintiff was injured by stepping on a defective spot in the crossing, or by stepping into a hole on her own premises. If she is telling the truth she is entitled to recover, since the defect appears to have been one which could not have existed except through negligence of the city. The instructions fairly presented the only real issue of fact in the case and there is no room for the thought that the jury did not understand that issue and address themselves to its solution.

The point of an excessive verdict is not well taken.

The judgment is affirmed. All concur.

STATE ex rel. SCHENK, Respondent, v. HENRY P. FLICK et al., Appellants.

Kansas City Court of Appeals, May 4, 1914.

BILL OF EXCEPTIONS: Change of Judge: New Circuit. A case was tried by the regular judge of the circuit court for the county and time given the defeated party to prepare his bill of exceptions. Before that time expired and before the bill was signed the county, by act of the Legislature, was taken out of the trial judge's circuit and put into a new circuit organized by the act, the Governor appointing a judge for such new circuit. The trial judge signed the bill and it was held he had no authority to do so; that the new judge was his successor and the proper official to sign it.

Appeal from Schuyler Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

AFFIRMED.

E. R. Bartlett for appellants.

J. E. Luther, H. V. Smoot and *E. R. McKee* for respondent.

Digitized by Google

ELLISON, P. J.—Sylvanus Flick died and his widow Sarah was appointed administratrix of his estate by the probate court of Scotland county. The latter died before her administration ceased and her son, H. P. Flick, was appointed administrator of her estate, and relator, as public administrator of the county, was appointed administrator *de bonis non* of the estate of Sylvanus which was left not wholly administered by Sarah at her death. Relator claimed that H. P. Flick when appointed administrator of the estate of his mother Sarah, took possession of assets as her individual property and converted it to her estate which she, in fact, only held as administratrix of her deceased husband Sylvanus, and he brought this action in the circuit court of Scotland county on the bond of said Flick for the value of such assets so alleged to have been converted. A change of venue was taken to Schuyler county which is not in the same circuit with Scotland. A trial was had in Schuyler before Judge Shelton, the regular judge of that circuit, which resulted in a judgment for plaintiff. Defendant thereupon appealed to this court.

Plaintiff, passing by all other questions, attacks the legality of defendant's bill of exceptions. Time was given to prepare the bill and when it was prepared it was signed by Judge Shelton who was then (and is yet) a circuit judge, but who, since the trial and before he signed, had ceased to be judge of the circuit court of Schuyler county and Judge Pettengil had become his successor.

That situation came about in this way: At the time of the trial Schuyler county was a part of the second circuit, Judge Shelton being the judge. After the trial and during the time taken to prepare the bill and before it was signed, the Legislature created a new circuit (Laws 1913, p. 216) by taking Lewis and Clark counties from the first and Schuyler from the second circuit and designating it as the 37th circuit. There-

Digitized by Google

upon the Governor appointed Judge Pettengil as the judge. Plaintiff contends that notwithstanding Shelton tried the case, Pettengil, his successor, should have signed the bill.

The general statute (Sec. 2032, R. S. 1909) provides that: "In any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action, or their attorneys, or shown to the judge to be correct shall be signed by the succeeding or acting judge of the court where the case was heard." It will be observed that if the parties cannot agree on the bill prepared it may be *shown* to the judge to be correct. The Supreme Court in State ex rel. v. Gibson, 187 Mo. 536, 554, commented on the statute and the different practice it permits from that which prevailed before its enactment. Before the day of preserving the actual occurrences at a trial by shorthand methods, it seemed to be really necessary that the bill of exceptions should be taken at the time and signed by the judge who observed and heard the things he certified to in the bill; and if it happened that he died or went out of office, his successor necessarily could not perform that act. But, says the court in that case, with the improved methods of the stenographer, a judge who had not heard the case, for all practical purposes, could become informed as to what transpired at the trial. In view of this, the Legislature, in the section above quoted, set aside those decisions "requiring the trial judge and no other to settle and sign the bill of exceptions."

In Ramey v. Hammond Packing Co., 132 Mo. App. 327, we decided that where the regular judge had tried a case and given until the next term to prepare a bill of exceptions, became so ill that he could not hold the next term and a lawyer, in pursuance of the statute, was elected by the bar to hold the term in his stead, the regular judge was disqualified, during that term,

Digitized by Google

from signing and filing in court the bill of exceptions. That, under the statute, the judge elected by the bar, was his successor for the term, with all the powers of the regular judge. That case was approvingly cited in Farley v. Welch, 237 Mo. 128, 140.

In Fenn v. Reber, 153 Mo. App. 219, it was held by the St. Louis Court of Appeals that if the judge who tried the case in a circuit composed of several divisions presided over by as many different judges, who, under the law rotate or succeed one another in service, is succeeded by one of the other judges before the bill of exceptions is signed, the trial judge cannot act and the bill must be signed by the presiding judge.

But in Patterson v. Yancey, 97 Mo. App. 681, the facts were quite similar to those in this case, and the ruling was that the judge who tried the case could properly sign the bill though the court in which the case was tried had been taken from his circuit and put in another circuit presided over by a different judge. But that case was disapproved by the same court in Fenn v. Reber, and we think inferentially condemned by the Supreme Court in the Gibson case, supra. In the latter case the court called attention to the fact that "there is a line of cases" (the cases relied upon in Patterson v. Yancey) "holding otherwise, of which State ex rel. v. Barnes, 16 Neb. 37, is a sample, but it does not appear that such a statute as section 731 supra (now 2032) existed there or in the States whose appellate courts are cited by the Nebraska Court."

The foregoing views show that the paper presented here as a bill of exceptions must be disregarded. And this leaves us with nothing but the record proper and in that we do not find any error. The judgment will therefore be affirmed. All concur.

Digitized by Google

LIZZIE GRAY, Respondent, v. J. WALTER DOUBIKIN, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **ADMINISTRATION: Concealment of Assets: Verdict: Compromise.** In a trial of interrogatories propounded to an administrator charging him with having embezzled or concealed property belonging to the estate, where his answer claims the property as a gift from the deceased, the verdict should be for or against him and an attempted compromise by the jury by giving him one half the property when the evidence showed he owned all of it, or none, cannot be sustained.

2. ———: ———: **Judgment: Inventory: Appraisement.** On trial of interrogatories charging an administrator with concealing or embezzling property of the estate and his answer makes claim to the property as a gift from the deceased, if the finding is against him, there is no authority for a judgment that the property belongs to the complainant. The judgment should be that it is property of the estate and it should direct the administrator to inventory it and have it appraised.

Appeal from Miller Circuit Court.—*Hon. J. G. Slate*, Judge.

REVERSED AND REMANDED.

W. S. Stillwell and *W. S. Pope* for appellant.

Sid C. Roach and *B. Reed* for respondent.

ELLISON, P. J.—Defendant is administrator of his deceased father's estate and plaintiff is defendant's sister and one of several heirs of deceased's estate. The deceased owned ten shares of stock in the Farmers and Traders Bank of Iberia, for which he held two certificates for five shares each. He was sorely afflicted and had determined to go to St. Louis for the purpose of having an operation performed by surgeons. He thought probably he would die before his return and

Digitized by Google

assigned to defendant the two certificates of stock; and, perhaps the next day, went to St. Louis where he died within two or three days after his arrival.

Defendant claims the certificates were a gift *causa mortis,* and that upon his father's death he became the owner. The complainant claims that the certificates were merely assigned to defendant to "look after" while deceased was absent in St. Louis and if he died while there, to be divided among the heirs with other personalty.

Defendant, as administrator, did not inventory the certificates as a part of the estate and this proceeding was begun in the probate court of Miller county under the statute (Sec. 74, R. S. 1909) to compel him to inventory the certificates and cause them to be appraised as property of the estate. After a trial in the circuit court on appeal from the probate court by the defendant administrator, the following verdict was returned and the following judgment entered thereon:

"Now comes the jury and returns into open court the following verdict to-wit: 'We, the jury, find the issues for the complainant that complainant have judgment for five shares of the bank stock described in the suit; and that the defendant is the owner of five shares of the stock and that the defendant pay the cost of this suit.

" 'E. A. Becker, Foreman.'

"Whereupon it is considered, ordered and adjudged by the court that the complainant herein have five (5) shares of the bank stock described in this suit and that defendant have five (5) shares of said stock and that the costs of this suit be taxed to defendant and that execution issue therefor."

The verdict was not justified by the evidence and the judgment is not justified by the law. Under the interrogatories, the answers thereto by defendant, considered with the other evidence, the verdict should

Digitized by Google

have found in favor of defendant for both certificates, or against him for both, according as the jury, after hearing the evidence, may have disbelieved or believed such evidence when considered in connection with his answer to the interrogatories. The judgment gave one of the certificates to the complainant, who was only one of several heirs entitled to the estate. There was no authority for this. Under the statute (Sec. 74, R. S. 1909), if the finding is against the administrator the judgment should be that he is not entitled to the property claimed by him; that it was the property of the estate, and should direct him to inventory it and to cause it to be appraised and held and accounted for by him as administrator.

The judgment is reversed and the cause remanded. All concur.

TURNER E. SMITH, Respondent, v. FREDERIC A. DELANO et al., Appellants.

Kansas City Court of Appeals, May 4, 1914.

1. **JUDGMENTS: Receivers: Appeal: Nunc Pro Tunc Judgment.** A judgment was rendered against three receivers of a railway company as such receivers, but by mistake the clerk entered the judgment against them as individuals. It was held that after appeal had been taken and the transcript filed in the appellate court, the trial court had jurisdiction to correct the judgment *nunc pro tunc* so as to enter is as rendered.

2. **ASSAULT AND BATTERY: Negro Porter: Passenger.** Where a negro porter standing outside coaches of a waiting train makes offensive remarks to a passenger making inquiry as to which coach he should enter and, after some words starts to assault the passenger, when the latter resists and a fight ensues, the carrier is liable in assault and battery.

3. ———: **Damages Actual and Punitive.** In an action for assault and battery by a negro porter on a passenger making inquiry as to which car he should enter, $500 punitive damages are not excessive.

Digitized by Google

Appeal from Ray Circuit Court.—*Hon. Frank P. Divelbiss,* Judge.

AFFIRMED.

J. L. Minnis and *Lavelock & Kirkpatrick* for appellants.

Hamilton & Herndon for respondent.

ELLISON, P. J.—Plaintiff's action is based on an assault and battery by one of defendants' servants. The judgment in the trial court was for plaintiff.

It appears that the Wabash Railway Company was in possession and was being operated by the three defendants as receivers and that, as such, they operated the road as an ordinary common carrier of passengers. The judgment for plaintiff was entered as though rendered against the defendants individually and this seems not to have been discovered until after defendants' appeal to this court had been taken and the transcript filed here. When discovered plaintiff filed a motion in the trial court for an entry of a proper judgment against defendants in their capacity as receivers and that the amount thereof be satisfied out of the property of the railway corporation in their hands as receivers (Proctor v. Ry. Co., 42 Mo. App. 124). This motion, after due hearing, was sustained.

After citing authority on the proposition that receivers of a corporation cannot be "sued individually for acts done officially and that personal judgments, where sued as receivers, are unenforcible," defendant seeks to hold plaintiff to the record of the judgment before the change made by the *nunc pro tunc* order. It is insisted that the corrected record of the judgment could not be made after an appeal had been taken and the transcript of the record filed in the appellate court.

Digitized by Google

We think this is an erroneous view. It is true that after an appeal is taken jurisdiction of the cause is transferred with the appeal to the appellate court, but the trial court still retains jurisdiction over its records and may order them amended from proper data. [Sec. 1851, R. S. 1909; DeKalb Co. v. Dixon, 44 Mo. 341; Ross v. Railway Co., 141 Mo. 390 and cases cited; Reed v. Bright, 232 Mo. 399, 415; Jackson v. Fulton, 87 Mo. App. 228.] We therefore have concluded that defendants' objection to the judgment as last entered, including that part of the objection that it was error to include in the amendment the direction to make the money out of assets and property of the corporation in defendants' hands, should be overruled.

The only other complaint is that the verdict is against the weight of the evidence and that it is excessive and thereby discloses passion and prejudice on the part of the jury. The evidence in behalf of plaintiff, in view of the verdict in his favor, must be accepted as showing the facts in the case. From this evidence it appears that plaintiff had purchased a ticket on defendants' road at the ticket office in Kansas City and had showed it to the gatekeeper who passed him out to the tracks at the station to get upon his train. He saw a negro porter standing at the entrance of the steps to one of the chair cars in the train and asked him if there was a smoking car towards the front end. To this inquiry he received an insulting answer in tone and manner. Plaintiff got upon the platform between the smoker and chair car, saw the smoker was pretty well filled and turned towards the chair car. Then some request was made by the porter to see plaintiff's ticket, which he being up on the platform, refused to show to the porter, but did show to a brakeman. When he descended from the car and started away to another car more words followed when the porter called him a vile name and started after him. Plaintiff threw his grip forward and at the approach-

Digitized by Google

ing negro in defense of his threatened assault. A fight ensued amid a crowd of onlookers, which resulted in some injury to both. Plaintiff was knocked down and received several bruises. Finally the negro "ran for a policeman" and the affair ended.

Accepting plaintiff's version of the matter, as we must, it is manifest that no other verdict could have been rendered than one in his favor. The question of prejudice is but a part of the point made as to excessive amount of the damages, $500 actual and $500 punitive. These amounts seem reasonable enough; they have met the approval of the trial judge, and we would not be justified in reducing them. The punitive sum might have been materially more without passing beyond reason. The actual damage is justified on the ground that plaintiff was hurt, though not permanently, yet severely and the evidence showed he suffered from the nervous shock resulting from the encounter.

On the whole record there is no ground for our interference and we affirm the judgment. All concur.

ESTELLA OSBORN, Respondent, v. THE WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **NEGLIGENCE: Railroad Crossing: Duty to Look Both Ways and Listen.** A railroad crossing is a dangerous place and is itself a signal of danger. A traveller approaching it is, therefore, imperatively required by law to look carefully in both directions, at a convenient distance from the crossing and where the look will be effective, before venturing upon it, if, by looking, a train can be seen. And the duty to look is a continuing one until the crossing is reached. Not only is he required to look but also to listen. He must not venture blindly on the track without first using his senses of sight and

Digitized by Google

hearing, and if, for any reason, his sight is obstructed that is all the more reason for a greater exercise of his sense of hearing.

2. ———: ———: ———: **Contributory Negligence.** While the statute, Sec. 3140, R. S. Mo. 1909, requires the bell to be rung 80 rods from the crossing and to be kept ringing until the crossing is passed, or the whistle to be sounded at said distance and to be sounded at intervals until the crossing is reached, and renders the railroad liable in damages for a failure to do so, yet the statute also provides that this will not preclude a showing that such failure was not the cause of the injury, and the rule of contributory negligence is not abrogated. So that even if the statutory signals are not given, if a person by exercising ordinary care could have avoided injury and fails to do so, he cannot recover, since he is guilty of contributory negligence.

3. ———: ———: ———: ———: **Right to Presume Signals Will be Given.** It is only where the person about to cross a railroad is paying attention, and can neither see nor hear anything indicating that a train is coming, that he can assume, without negligence, that, if one were coming, the signals would be given. But where a person can see and hear, or can do either, he cannot rely blindly upon any presumption that the signals will be given. He can neither close his eyes nor his ears, but must use the means of self protection given him.

4. ———: ———: ———: ———: **Unusual Conditions: Foggy Weather: Presumption of Care on Part of Deceased.** Deceased was approaching a railroad crossing in an enclosed two wheeled cart travelling at the rate of four miles per hour. He had on a cap with the ear flaps partially pulled down. A glass window in front and one on each side enabled him to see in front and to the right and left. On a clear day for at least 100 feet before reaching the crossing he could see down the track for a quarter of a mile or further. No one saw the collision, and it is not known what deceased did in the way of looking and listening. There was no wind blowing. A fog prevailed to a varying extent, sometimes heavier, then lighter, and then settling again. It lay in strata, heavier at some periods of the day and in some places than at other periods and in other places. There was nothing to prevent deceased from hearing the train. It consisted of an engine and caboose with 23 cars loaded with coal, comprising a train of 1100 tons going 35 miles an hour, and ran over a trestle the north end of which was 240 feet of the crossing. All witnesses, who were where they could hear the train, heard it easily and distinctly at distances varying from a quarter to three quarters of a mile away and that within a few moments before the crossing was

Digitized by Google

reached. No difficulty was had in locating the place and direction from whence the sound came and the character of the train. Of the witnesses who testified concerning the ability to see the train on account of the fog, two of them were plaintiff's witnesses, both of whom saw it a quarter of a mile away notwithstanding the fog, one of these saw it as it passed over the trestle. The third was not at a place where he could have seen the train but gave his opinion that it could not have been seen more than 50 yards away. Defendant had two witnesses who saw and heard it a quarter of a mile away, one of them just before it reached the crossing and looking along the same line deceased would have to look to see it. *Held*, that under these circumstances and this evidence the presumption cannot be indulged that deceased was in the exercise of ordinary care. For what all the witnesses, located more unfavorably than was deceased, heard, he could have heard had he been in the exercise of due care. Where the positive and uncontradicted facts show that if deceased had taken those precautions which the law required of him to both look and listen, he would have been aware of the approach of the train, the presumption of due care cannot stand.

5. ———: ———: ———: ———: ———: ———: ———: ———. If, however, the fog obscured his view, this did not relieve deceased of negligence but rather served to increase tne degree of care required of him to listen and otherwise satisfy himself that no train was approaching. Unusual conditions demand extra precautions. Ordinary care under normal conditions is not ordinary care under unusual conditions produced by dust, fog, snow and the like. Deceased's sight and hearing were both good. The train, according to all the evidence was making a great noise. If deceased had listened he could have heard what others heard, and in the presence of the undisputed fact that all others did hear there is no room for the presumption that deceased listened but did not hear and should be relieved from negligence because he failed to hear.

6. **EVIDENCE: Conflict: Opinion of Witness.** Where credible witnesses, having opportunity for observation, testify that a fact exists, no conflict arises from the expression of an opinion to the contrary by another witness when it affirmatively appears that his situation was not such as that he could have observed and formed an opinion concerning the fact about which he attempts to express an opinion.

7. ———: ———: ———. A witness who has sufficient knowledge of the facts and is so situated as to be able to form an opinion, may give that opinion as to the distance an object could be seen, but such evidence is of a weak character as compared to positive testimony on the subject and where the

Digitized by Google

witness is shown not to have been present at the time and place in question so as to have been able to form an opinion on the matter, it will not have sufficient probative force to create a conflict with such other positive testimony. While a witness may testify that certain things could or could not have been seen from one point to another, it must be shown that he was in a position to form an opinion and did form it, and that his statement is something more than a mere guess.

Appeal from Gentry Circuit Court.—*Hon. Wm. C. Ellison,* Judge.

REVERSED.

J. L. Minnis, N. S. Brown and *J. W. Perry* for appellant.

D. D. Reeves and *Kendall B. Randolph* for respondent.

TRIMBLE, J.—Shortly before one o'clock in the afternoon of January 20, 1911, plaintiff's husband, Ira B. Osborn, was struck and killed at a public crossing by one of defendant's freight trains. This suit is to recover damages for his death upon the ground that it was caused by the negligent failure of those in charge of the train to give the statutory crossing signals. The answer, in addition to a general denial, pleaded contributory negligence. A trial was had resulting in a verdict for plaintiff in the sum of $3000. Defendant appealed, and the sole question presented is whether defendant's demurrer to the evidence should have been sustained. To state it more specifically, the controversy is over the element of contributory negligence charged to have been shown on the part of deceased, that is, upon the question whether the evidence discloses that, in going upon the track under the circumstances, he was, as a matter of law, lacking in that care and caution which ordinarily prudent persons would ordinarily use in the same situation and circumstances.

Digitized by Google

The case presents no phase of the humanitarian doctrine. It is based solely on the failure to give the statutory signals, and there is no doubt but that the evidence, upon all features, aside from contributory negligence, presented a case for the determination of the jury.

In order that this question of deceased's contributory negligence may be understood and properly disposed of, it is necessary to state with some particularity the surroundings at the scene of, and the circumstances attendant upon, the killing.

The crossing in question was upon a public road running due east and west. The railroad runs from the southeast to the northwest, and the track is straight for some distance on each side of the crossing. The deceased was a rural mail carrier and was familiar with the crossing. He was travelling east along the county road, driving two ponies hitched to a two-wheeled cart which he used in delivering the mail. The seat was enclosed, but there was a window in front and one on each side of the box through which he could easily see. The seat was low and, when seated in the vehicle, deceased's head was about on the same level it would have been had he been walking along the road. He was a young man, in good health, with full possession of his faculties of sight and hearing, and wore a cap with ear muffs which came down partially over his ears.

The crossing was three-quarters of a mile southeast of the station of Whitton. There was no station or station agent at this place—only a platform and siding. A regular eastbound passenger train usually passed Whitton at 12:30, but on the day in question it had orders not to pass Whitton before 12:50. And this twenty minutes was given to an extra westbound freight train to run from McFall northwest to Whitton and get on the siding there in time to allow the passenger to pass. If at the hour of 12:50 the freight had

Digitized by Google

not arrived, or the passenger train had not been flagged, the latter had a right to proceed. So that when deceased approached the crossing in question at 12:40 it was a little past the usual time for the passenger train to go southeast at that point, and it had not yet reached Whitton. The extra freight, however, was approaching the crossing, going northwest, and running at thirty-five miles an hour in order to reach Whitton and get in the clear before the passenger train's time of 12:50 was up. The pilot of the engine struck the team and cart on the crossing in such a way that both of the horses were thrown on the east side of the track, one of them being killed and falling on the north side of the road, the other being knocked down. The wagon was smashed and scattered along the track, and deceased's body was carried on the pilot a short distance, perhaps 200 feet up the track, and then thrown to the east side thereof. His cap was found on the pilot with the ear laps slightly down, and he was dead when reached.

Although the evidence is conflicting as to whether the train whistled for the crossing, yet, as there was substantial evidence tending to show that it did not, and the jury found for plaintiff, we must, for the purposes of the question now before us, assume that neither the bell was rung nor the whistle blown as it approached the crossing. The only audible warning of its approach, therefore, given by the train, was merely that which accompanies a heavily loaded freight train consisting of an engine with twenty-three cars and a caboose—the load being something over eleven hundred tons. The track was slightly down grade for a short distance next to the crossing, and then at the crossing it changed to upgrade.

The county road passed over the top of a hill about 700 feet west of the crossing and then came on down the hillside to a slightly low place at the foot of the hill about 400 feet west of the crossing and thence con-

Digitized by Google

tinued east on a slight up grade to the crossing. From the top of the hill, and from any point along the greater portion of the hillside, as one came down toward the crossing from the west, the railroad to the southeast could be distinctly seen for at least a half mile on a clear day. There is a conflict in the evidence as to whether the railroad could be seen from the low place in the road at the bottom of the hill, the defendant's evidence tending to show that even at that point, 400 feet from the crossing, and from thence to the crossing, the railroad to the southeast could be seen for a quarter of a mile or more. Plaintiff had evidence tending to show that the railroad could not be seen at this low place nor at certain points thereafter along the road. But, aside from this conflict, the evidence all shows that on a clear day, for at least 100 feet before the crossing was reached, the railroad could be seen without any difficulty for more than a quarter of a mile to the southeast.

The day in question was cloudy and misty, and a fog prevailed to a greater or less extent throughout the day. Sometimes it would lift or clear for awhile and then would settle again. The fog appeared to lie in different strata some of which were denser than others, and the degree of obscurity was greater at some periods of the day and in some places than at other periods and in other places. The part the fog had, or may have played, in preventing deceased from *seeing* or *hearing* the train may be more correctly presented by a careful analysis of the evidence of the witnesses on this point.

P. M. Ward, witness for plaintiff, who lived three-quarters of a mile southeast of the crossing and who was in his lot feeding his cattle, *heard* the train coming when it was half a mile away and *saw* it when it came around a bend a quarter of a mile away, and saw it was a freight train.

Digitized by Google

Wade Henderson, another witness for plaintiff, a young man, lived a quarter west and a little south of the crossing, about diagonally across a forty acres southwest from the crossing. He and his father were in the house with the doors and windows closed. Their clock had stopped and, knowing the usual time for the passenger train to go by, they desired to set it in accordance therewith. Both heard the freight train, and the father told the son to look out and see if it was the passenger. The son went to the door and saw the train on the trestle a little over a quarter of a mile away and recognized it as a freight train. The north end of this trestle was not quite a hundred yards from the crossing. So that both father and son, inside the house and with the doors and windows closed, heard the train, and the son saw it a quarter of a mile away on the trestle the north end of which was within 300 feet of the crossing where the collision took place. This witness said it was foggy but that he had no difficulty in seeing that it was a freight train and could hear the roar and rumble of the train very distinctly.

Mrs. Spires, another witness for plaintiff, living about three-quarters of a mile south of the crossing and something like thirty-five yards from the railroad track was in her house with the doors and windows closed, engaged in churning. She heard the train as it passed and thought at first it was the passenger but concluded it made too much noise for that and looking out saw it was the freight.

Two other witnesses for plaintiff, Mrs. Finderburg and her husband, testified to hearing the train, the former while in her house about forty yards from the railroad and the other about a half mile therefrom, but, as they were two and four miles respectively from the crossing, their testimony would not throw light on the noise the train made at that point or on the distance it could be seen there. So that of all of plaintiff's witnesses who testified, none swore to facts showing that

Digitized by Google

the train could not be *heard* and its direction ascertained, on account of the fog. And none of them testified to any facts showing the train could not have been *seen* for at least a quarter of a mile on account of the fog, unless it be the witness, Woodson Swope, whose testimony we will now consider.

This witness was at Whitton, three-quarters of a mile northwest of the crossing, when the accident happened. He was expecting the passenger train from the northwest. But he heard the freight running as it approached Whitton when it was a quarter of a mile away, and knew from the sound and direction thereof that it was not the passenger. His testimony, therefore, showed no difficulty for the train to be *heard* on account of the fog. And as to the difficulty of its being *seen* on that account, he testified as follows: "Q. What kind of a day was it as to fog? A. Why, it was a very foggy day. Q. To what extent was the view obscured? A. Well, I don't suppose you could have seen anything very far. I don't suppose you could have seen a train over fifty yards, very much; I wouldn't judge that you could."

In view of the fact that he was three-quarters of a mile distant from the crossing, that the fog was more dense at times than at others, that it came and went, and varied greatly not only at times but also at places not far apart, and that the form of the answers discloses that he was not attempting to do anything more than to give expression to a mere opinion, can it be said that this evidence constitutes any substantial basis on which to determine how far the train could have been seen at the crossing, the moment of the accident? Especially when plaintiff's other witnesses show that when the train was on the trestle approaching the crossing not much over 100 yards from it and a very few seconds before the accident, it could be both seen and heard for a quarter of a mile? Added to this is the

Digitized by Google

evidence of the following witnesses who testified for defendant:

W A. Henderson, father of the young man who testified as above stated. He was in his house with the doors and windows closed slightly over a quarter southwest of the crossing. He and his son heard the train on the trestle and his son looked out, saw it a quarter of a mile away and, though there was some fog, yet he recognized it as a freight train and so reported to his father. After eating his dinner, the father went to the barn and saw the passenger train standing at the crossing something over a quarter of a mile distant. However, the atmosphere was clearer at this moment.

George Low lived a half mile west of the crossing. He was cleaning the snow and ice off his porch and heard the train coming when it was three quarters of a mile away and recognized from the noise it was making that it was a freight train. At this time it was a quarter or little over a quarter of a mile distant from and had not reached the crossing.

Owsley Brown lived a half mile east and ten or twelve rods north of the crossing. He was in his yard at the time of the collision and heard the train when it was a half mile south of the crossing and only a minute before deceased was killed. The train, at that moment, was three-quarters of a mile from the witness, and his attention was attracted to the noise and rumble of the train passing over the trestle.

Bert Lumry was on the railroad west of the crossing and walked southeast down the railroad toward the crossing for about a quarter of a mile and left it at a point half a quarter north of the crossing a moment before the collision, going west to a well to water some stock. While on the railroad he looked ahead of him past the crossing and both saw and heard the freight train coming toward him. The train at that time was three-quarters of a mile from him, and his vision was along the same line of that of anyone who

Digitized by Google

would be approaching the crossing at that time and looking for the train. He had left the railroad, however, and had started west to a well in the field when the train reached the crossing.

Alvin Whitton was in the store at Whitton but was expecting to take the passenger train when it came by. He heard the train when he was in the store and thought it was then about three-quarters of a mile down the track. This would put it right at the crossing and may have been the stock alarm blown a moment before deceased was struck. But when he went outside he saw it fully half a quarter away and recognized it as a freight train just slowing up. He stayed outside only about three minutes, long enough to see it was a freight and then went back inside.

It is true the five foregoing witnesses testified for defendant, and while, in considering whether or not a case was made for the jury, plaintiff's evidence must be accepted as true and it must be given the benefit of every inference which can be rightfully drawn therefrom, yet it must also be remembered that where plaintiff's evidence does not contradict that of defendant's and plaintiff's case rests upon an inference "scarcely more than conjecture, or the possibility that the fact might exist, then the court ought to look at the character of the evidence on the other side." [Furber v. Bolt & Nut Co., 185 Mo. l. c. 311; Link v. Hathway, 143 Mo. App. l. c. 509.]

No witness saw deceased approach the track, and no one testified as to what he did with reference to looking or listening. The engineer was on the right-hand side of his engine, and the boiler and cab shut off his view to the west of the crossing. The first he saw was the horses coming up over the pilot on the east side the instant of the collision. The fireman was shovelling coal at the time. The conductor and head brakeman were also in the cab, but the conductor was in the engineer's seat and had no better view than the engi-

Digitized by Google

neer. The head brakeman was not called as a witness by either side. He was, at the time of the trial, in Colorado for lung trouble.

The foregoing is a fair statement and resume of all the circumstances under which deceased was struck and killed. What is the law governing the situation applicable to the deceased and the defendant at that time?

Deceased was approaching a railroad crossing in an enclosed two-wheeled cart at the rate of four miles an hour. For a distance of at least 100 feet before he reached the crossing he could, on a clear day, see down the track for a quarter of a mile or further. (The effect of the fog will be discussed later.) As a railroad crossing is a dangerous place the law imperatively required deceased to look careully in both directions, at a convenient distance from the crossing and where the look will be effective, before venturing upon it, if, by looking, a train could be seen. And the duty to look is a continuing one until the crossing is reached. [Kelsay v. Mo. Pac. Ry. Co., 129 Mo. 362 l. c. 372.] Not only was he required to look but also to listen He must not venture blindly on the track without first using his senses of hearing and sight. [Lien v. Railroad, 79 Mo. App. 475, l. c. 480.] And if for any reason his sight was obstructed that was all the more reason for a greater exercise of his sense of hearing.

The statute, section 3140, Revised Statutes 1909, required the engineer to ring the bell a distance of eighty rods from the crossing and keep ringing it until the crossing is passed, or to sound a whistle at least eighty rods from the crossing and to sound it at intervals until the crossing is reached, and makes the road liable in damages for a failure to do so, but provides that "nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury." And while evidence of an injury at a public crossing, where the statutory signals are not given,

Digitized by Google

makes a prima-facie case and throws the burden of proving nonliability on the defendant (Weigman v. Railroad, 223 Mo. l. c. 721), yet this does not abrogate the rule of contributory negligence. Even if the statutory signals were not given, if a person by exercising ordinary care could have avoided injury and fails to do so, he cannot recover, since he is guilty of contributory negligence. [Hayden v. Railway, 124 Mo. 566; Huggart v. Railway, 134 Mo. 673; Green v. Railway, 192 Mo. 131; Smith v. Railway, 150 Mo. App. 1; Crumpley v. Railway, 111 Mo. 152.] And while in certain cases it is said that a person about to cross a railway has a right to presume that the statutory signals will be given, it is only where the person is paying attention, and *can neither see nor hear anything indicating that a train is coming,* that he can assume, without negligence, that, if one were coming, the signals would be given. [Donahue v. Railroad, 91 Mo. 357, l. c. 363; Hennayde v. Railroad, 45 Mo. 255, l. c. 261; Ernst v. Railroad, 35 N. Y. 9; Weigman v. Railroad, 223 Mo. 699, l. c. 719.] So that where a person can see and hear, *or can do either,* he cannot rely blindly upon any presumption that the signals will be given. "A railroad crossing is within itself a signal of danger. The law imposes upon the traveller the duty of exercising caution at such places. He must make some effort to find out if there is an approaching train before he drives upon the tracks. He can close neither his eyes nor his ears. The means of self-protection given him must be used." [Burge v. Railroad, 224 Mo. 76, l. c. 94.]

If, therefore, the collision had occurred on a clear day of ordinary weather, no one could well contend that deceased was not guilty of contributory negligence in driving upon the crossing in front of this swiftly moving and heavy train. The question then arises what effect or change in that regard does the foggy

Digitized by Google

condition of the weather present so as to take his act out of the realm of contributory negligence?

So far as his ability to *hear* the train is concerned, there was nothing, in the way of obstructions or of fog, to prevent that. Not a witness declared that they had any difficulty in hearing on account of the fog. On the contrary, all of the evidence was that the day was still, there was no wind blowing, and *all* of them heard the train easily and distinctly at distances varying from a quarter to three-quarters of a mile away, and that within an exceedingly short time prior to the accident. Some of these witnesses were in closed houses at the time. Neither did any of them have any difficulty in locating the place and direction from whence the sound came and the character of the train. In addition to this, it was conceded that the train consisted of an engine and caboose with twenty-three cars loaded with coal comprising a train of 1100 tons going thirty-five miles an hour over a trestle the north end of which was scarcely 100 yards southeast of the crossing. One of the witnesses spoke of the roar and rumble it made in going over this trestle, and it is a well-known fact that the noise and roar is increased by a train passing over such a structure.

As to the ability to *see* the train, notwithstanding the fog, plaintiff had only three witnesses who could be said to speak on this point. One of these was young Henderson, who saw the train a quarter of a mile away and recognized it as a freight at the moment it was passing over the trestle. The second was P. M. Ward, who heard it a half mile away and saw it a quarter of a mile distant. The third was Woodson Swope, who was at Whitton when the accident occurred, who did not test the fogginess of the atmosphere by looking at the train or any other object, but who when asked to what extent was the view obscured, expressed himself in these words: "Well, I don't suppose you could have seen anything very far. I don't suppose you

Digitized by Google

could have seen a train over fifty yards very much; I wouldn't judge that you could." Defendant had two witnesses who said they saw the train, one Bert Lumry, who was walking on the railroad toward the crossing from the northwest and saw and heard it before it reached the crossing and the other, Alvin Whitton, who was at Whitton and upon going outside saw the train fully half a quarter away and recognized it as a freight train.

If now it was the duty of deceased to both look and listen for the train, what grounds have we for saying that he is excused from negligence in not seeing or hearing it? As said in Burge v. Railroad, supra, l. c. 94: "In this case witnesses more unfavorably located than was deceased heard the "roar" of the approaching train. What the witnesses heard, the deceased could have heard had he been in the exercise of due care. What they saw he could have seen by the exercise of due care. The fact that they heard the approaching train is conclusive that he was not exercising his sense of hearing to determine whether or not there was an approaching train." Certainly he had no excuse for not *hearing* it, since everyone, who was in hearing distance at all, heard it. And the two who were in a position to know whether or not it could be *seen* at the time of the collision said *they saw* it. Can it be said under such circumstances that we can indulge in the *presumption* that deceased was in the exercise of ordinary care? Do not the uncontradicted facts destroy that presumption? As said in Burge v. Railroad, 244 Mo. l. c. 94: "There is no room for the presumption of care in this case. Such presumption is a presumption of fact, and upon the appearance of the facts in evidence the presumption takes flight, and no longer has a place in the case. [Higgins v. Railroad, 197 Mo. 318; Tetwiler v. Railroad, 242 Mo. 178; Morton v. Heidorn, 135 Mo. l. c. 617, and cases therein cited.]" Where the positive and uncontradicted facts, such as were

Digitized by Google

shown in this case, show that if deceased had taken those precautions which the law required of him to both look and listen, he would have been aware of the approach of the train, the presumption of due care cannot stand. [Tomlinson v. C. M. & St. P. Ry. Co., 134 Fed. 233; Rollins v. C. M. & St. P. Ry. Co., 139 Fed. 639.]

But it is said that Osborn faced an unusual and confusing obstruction to the free exercise of his senses of sight and hearing by reason of the fog. There is no evidence whatever that his hearing was interfered with. No one else had any difficulty in hearing the train. And while it is perhaps well known that in a dense fog, so dense that objects only a few feet away are not distinguishable, sounds are distorted and misleading, yet, such is not the case where the fog is of that character that objects can be seen fifty yards away. We are also reminded that the deceased was in an enclosed cart with his ears partly muffled. This, however, cannot serve to relieve deceased of negligence, but rather increased the degree of care required of him under such circumstances. The rule is well stated in 2 White on Personal Injuries on Railroads, sec. 1083, where it is said that it is the duty of a person intending to cross a railroad track to listen as well as look, and if dust temporarily obscures his view he must stop and wait to get a better vew, or *listen* for a train, and that a like rule obtains in a case where the view is obscured by falling snow or a fog, and a traveller who, under such circumstances, drives upon the track without taking the extra precautions demanded by the unusual conditions, cannot recover. A railroad crossing is a warning of danger and one who crosses it, knows he is encountering a danger, and must act with care proportionate to the danger. [3 Elliott on Railroads, sec. 1165.] If he is in an enclosed vehicle with his ears muffled and a fog is prevailing, these conditions, so far from relieving him of care, should increase the

Digitized by Google

amount of care to be taken. Ordinary care under normal conditions would not be ordinary care under such unusual conditions. For "no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety." [Sanguinette v. Railroad, 196 Mo. l. c. 489.] "The measure of precaution to be observed by a traveller depends often upon the circumstances and surroundings." [Laun v. Railroad, 216 Mo. l. c. 579.] If the fog was so great that he could not see down the track for more than fifty yards then it was all the more incumbent upon him to listen. And where is there any evidence in the case from which even an inference can be drawn that *if he had listened* he would not have heard what *all the witnesses say they heard?*

The case at bar is not like the case of Weighman v. Railroad, 223 Mo. 699. In that case the view was hidden by an engine and long train of cars standing about eight feet from the side of the track; and the standing engine *by its noises prevented the plaintiff from hearing the approaching train,* and there was *no evidence that the latter made any noise to be heard.* [P. 721.] In the case at bar, the evidence is agreed that the train made a great noise and that everyone in hearing distance heard it and there were no obstructions to prevent deceased from hearing it. This shows, as said in the Burge case, that deceased "failed to hear, when to listen was to hear, because all the witnesses heard." So that, even if the evidence of Woodson Swope that a train could not be seen more than fifty yards be given the fullest weight and effect, yet, since that obstruction to deceased's sight would demand greater use of his hearing, and as the evidence shows that all others did hear, where is there any room for the presumption that deceased did listen? The evidence was that his sight and hearing were both good;

Digitized by Google

that the train was making a great noise. If his hearing was good, and he listened, why did he not hear what others heard? In the presence of the undisputed fact that if he listened he could hear what others could hear, and the further undisputed fact that all others did hear, what basis is there for the presumption that he listened but did not hear and should be relieved of negligence because he failed to hear? "Presumptions of this character are presumptions of fact—and the presumption takes flight upon the appearance of the facts themselves. When the facts themselves are in evidence there is no place for a presumption as to those facts." [Burge v. Railroad, 244 Mo. l. c. 95.]

The deceased and the engine reached the crossing at the same moment. Calculations based on the rate of speed each was shown to have been traveling, show that when deceased was 100 feet from the crossing the train was about 875 feet therefrom, less than a quarter of a mile away, the distance at which others saw the train at that moment. While deceased was travelling from this 100-foot point to a point fifteen feet from the track, where he was still in a place of safety, the train travelled at least 675 feet nearer the crossing and with its 1100 tons burden had thundered over the trestle (the north end of which was 240 feet away) making a noise which attracted the attention of persons in every direction, further away and certainly not so well situated to hear, as was deceased. As said in Chicago, etc., Ry. v. Andrews, 130 Fed. l. c. 71, quoted in Waggoner v. Railroad, 152 Mo. App. l. c. 179, common knowledge tells us that such a train over such a track makes a great noise not rendering it possible for it to come unpectedly upon one who is possessed of a good sense of hearing and is reasonably employing it under circumstances which otherwise permit its free use.

Viewing the case under every aspect possible in the light of the evidence, the presumption that deceased was in the exercise of ordinary care was clearly over-

Digitized by Google

come by all the evidence as to the fact that the train could have been heard had deceased listened. And as to the possibility of its being seen the facts disclosed by the evidence of all the witnesses, who were so situated as to have the opportunity for observation, show that it could have been seen had deceased looked. Where credible witnesses, having opportunity for observation, testify that a fact exists no conflict arises from the expression of an opinion to the contrary by another witness where it affirmatively appears that his situation was not such as that he could have observed and formed an opinion concerning the fact about which he attempts to express an opinion. [McGrath v. Transit Co., 197 Mo. 97; Heinze v. Railroad, 71 Mo. 636; Bennet v. Railroad, 122 Mo. App. 703.] A witness, who has sufficient knowledge of the facts and is so situated as to be able to form an opinion, may give that opinion as to the distance an object could be seen, or the distance one object was from another, but such evidence is of a weak character as compared to positive testimony on the subject; and where the witness is shown not to have been present at the time and place in question so as to have been able to form an opinion on the matter, it will not have sufficient probative force to create a conflict with such other positive testimony. [McCreery v. Railway, 221 Mo. l. c. 28-9; Markowitz v. Railroad, 186 Mo. l. c. 359.] While a witness may testify that certain things could or could not have been seen from one point to another, it must be shown that he was in a position to form an opinion and did form it, and that his statement is something more than a mere guess. However, if Swope's estimate as to the distance the train could be seen on account of the fog is entitled to probative force so as to create a conflict in the evidence as to obstructions to sight, there was no conflict whatever as to there being any trouble in hearing the train. If deceased could not see on account of the fog then he was

Digitized by Google

required to use his sense of hearing, and if he failed to exercise ordinary care in that regard he cannot recover. The undisputed evidence shows that he did fail in that regard, and hence the judgment must be reversed. It is so ordered. All concur.

STATE ex rel. WISEMAN, Appellant, v. JOHN W. URTON et al., Respondents.

Kansas City Court of Appeals, May 4, 1914.

1. **PUBLIC ROADS: Appeal: Township Board: Notice.** On appeal to the county court from the order of a township board changing a public road, the appellant must give written notice to the appellee 10 days before the county court convenes; and if he does not do so the appellee may move to dismiss the appeal; and whether there is such notice must be shown on trial of the motion.

2. **MANDAMUS: Discretion.** Issuance of mandamus to compel the county court to docket and try a road case appealed from a township board is discretionary with the circuit court and if the record of the county court shows that for any cause, the relator is not entitled to the writ, it will be refused.

Appeal from Cass Circuit Court.—*Hon. Nick M. Bradley,* Judge.

AFFIRMED.

W. D. Summers and *A. L. Graves* for appellant.

Allen Glenn and *J. S. Bierley* for respondents.

ELLISON, P. J.—This proceeding is mandamus to compel the county court of Cass county to docket and set for hearing a certain case for opening and changing a public road alleged to have been appealed

Digitized by Google

to that court from the township board in such county. The circuit court refused a peremptory writ.

Relators are a part of a number of petitioners for a public road. Their petition was addressed to the township board (Cass county being under township organization) and it asked for changing and laying out of a new public road. It was heard by the township board and refused. The refusal was endorsed on the back of the petition as required by section 10346, Revised Statutes 1899. The petitioners then appealed to the county court. Thereafter the county court docketed the cause and set the 14th of November, 1909, as the day for its hearing. On that day the remonstrators against the road appeared specially for a motion to dismiss the appeal. Three grounds were alleged: First, that the county court had no appellate jurisdiction; second, that in this class of cases no right of appeal existed for a refusal to open or vacate a public road; third, that no notice of the appeal had been given as required by law. The county court heard this motion and sustained it in these words, "Which motion was thereupon taken up and submitted to the court, and after hearing arguments, the court is of the opinion that they have no jurisdiction in the matter, and the motion is sustained and said cause is dismissed."

If the county court could properly sustain this motion, relators, of course, have no right to a mandamus. Several grounds have been stated in support of the motion. One of these, that no right of appeal existed and the other that if it existed no notice of the appeal was given. It is claimed that this case does not belong to that class in which an appeal is not allowed, as decided in Aldridge v. Spears, 101 Mo. App.; s. c., 40 Mo. App. 527. We need not pass upon this, since there is ample ground to justify the county court, in that no notice of the appeal was given. The statute (Sec. 10347, R. S. 1899) requires that on ap-

Digitized by Google

peal from the township board "the appellant shall serve the appellee at least ten days before the first day of the term of the county court at which the cause is to be determined, with a notice, in writing, stating that an appeal has been taken," etc. No such notice was given and the appeal could not remain effective without it, in the face of objections from the appellee. Relator has said that whether or not there was a notice would appear at the trial and that it was not proper to sustain the motion for such cause, as he might have produced a notice at the trial.

The suggestion is without merit. A motion is the proper practice. If, in such case, a notice exists, it should be shown on a hearing of the motion.

But it is said that granting a reason existed for dismissing the appeal, the county court did not do so, but dismissed the *cause*. We think the proper interpretation of the judgment of the county court is that it dismissed the appeal. The motion was for that action and the motion was sustained, the mere use of the expression "the motion is sustained and said cause is dismissed," instead of "appeal dismissed" was a clerical error. Without the notice, there was no jurisdiction of the person in the county court.

But if it be granted the county court dismissed the cause instead of the appeal, relators would still be without standing in this court. Issuing a writ of mandamus is discretionary with the court; and if the record shows that relator, for *any* good reason, is not entitled to it, it will not be issued. It would be singular action to mandamus a county court at the instance of an appellant, to hear a cause the appellee has a right to demand shall not be heard.

The judgment is affirmed. All concur.

Digitized by Google

EDWARD W. CHILTON, Plaintiff in Error, v. WILLIAM A. HARRIS, Defendant in Error.

Kansas City Court of Appeals, May 4, 1914.

1. **JUDICIAL SALE: Void Execution: Purchase: Sale Set Aside.** An execution was issued on a judgment wherein the plaintiff at the time of its issuance and levy was dead. The writ was levied upon real estate of the defendant which was sold by the sheriff and bought in by the plaintiff. Before the credit of the bid was made on the judgment and before any deed was made by the sheriff, on plaintiff's motion the execution sale was set aside and the writ quashed by the court on the ground that the writ was void. Afterwards plaintiff brought an action on the judgment and defendant set up the sale and purchase by plaintiff and claimed a credit, as a payment on the judgment, of the amount of plaintiff's bid. *Held*, that the rule of *caveat emptor* did not apply and that the sale was properly set aside and the credit of the bid properly disallowed.

2. **CAVEAT EMPTOR: Void Sales.** The rule of *caveat emptor* at all judicial sales is in force in Missouri; but it does not apply to sales which are void.

3. ———: **Quitclaim Deed: Void Deed: Liability of Vendor.** A purchaser at a judicial sale must beware and has no protecting warranty, his purchase being like a purchase by quitclaim deed from an individual. But this does not apply to a void sale, and though one purchasing by quitclaim deed is not entitled to reimbursement if there be no title conveyed, yet he is entitled to a *valid* deed and if it be void he may have redress on *that* account.

4. ———: **Mistake of Law: Independent Action.** There may be relief on account of the payment of money under mistake of fact, but not in an independent action, for mistake of law, if there is no fraud.

5. ———: ———: ———. While one may not have a right of action for mistake of law, in an independent suit, yet if under a void execution sale he makes a purchase, he may go into court in *that* action and have relief.

Error to Cooper Circuit Court.—*Hon. G. A. Wurdeman*, Special Judge.

AFFIRMED.

Digitized by Google

John Cosgrove for plaintiff in error.

W. G. & G. T. Pendleton for defendant in error.

ELLISON, P. J.—This is an action on a judgment against defendant W. A. Harris rendered in favor of George E. Harris in the circuit court of Cooper county on the 29th of October, 1903 for $1739.29 and for the costs taxed at $29.70. George E. Harris assigned the judgment to this plaintiff. The trial court rendered judgment against defendant W. A. Harris and he appealed to this court.

It appears from defendant's answer, sustained by the evidence, that George E. Harris, as plaintiff in the original judgment, assigned it to this plaintiff to secure a lawyer's fee due from him, and that he afterwards died. That long after his death, to-wit, on the 4th of March, 1913, the attorney for this plaintff the assignee, and of the heirs of George E. Harris the assignor, and of the lawyer to whom the fee was due, ordered execution on the judgment and such writ was issued and delivered to the sheriff who levied it upon lands of the defendant. These lands were regularly sold by the sheriff for the purpose of satisfying the judgment, the attorney who ordered the execution, purchased all but one acre of the land for his clients for the sum of $1975 and that acre was purchased by a daughter and one of the heirs of the deceased George E. Harris for $150.

The attorney ordering the execution knew that George E. Harris was dead, but seems not to have realized until after the sale that no title to the lands could be conveyed by the sheriff on an execution in favor of and in the name of a dead man, when, in the name of his clients (this plaintiff as assignee and the daughter) and at the return term of the execution, he filed a joint motion to recall and quash the execution for the reason that it "was void and conveyed no

Digitized by Google

title" to them. The circuit court, after hearing the motion, sustained it, and ordered the sheriff to refund the $150 bid and paid by the daughter and found that the attorney purchasing for his clients had not paid any money, as they owned the judgment. The parties agreed that the execution was void.

Afterwards the present action was instituted on the judgment as stated in the beginning and on the facts shown defendant insists that the amount of the bids at the execution sale should be credited on the judgment and that judgment be rendered against him for the balance only.

Plaintiff's position is that since he got no title at the sheriff's sale on account of the execution being void, he should be allowed to escape his purchase and not credit his bid on the judgment. While defendant insists that as no fraud or unfairness is pretended, and as plaintiff knew all the facts, and as his mistake was only one of law, he must abide by his purchase and credit his bid on the judgment.

It is commonly understood by the bar that the rule *caveat emptor* applies to sheriffs' sales. [Rorer on Judicial Sales, Secs. 174, 476, 528, 603; Kleber Void Jud. & Ex. Sales, Sec. 457; Stewart v. Derries, 81 Md. 525; Johnson v. Laybourn, 56 Minn. 332; Borders v. Hodges, 154 Ill. 498.] The questions presented under this general rule are interesting but unsettled. Diversity in mode of considering them has led to different conclusions. Some courts have pronounced the purchaser a mere "volunteer" in bidding and paying his money; and consequently holding that he must pay his bid, or if paid, that he cannot recover it back. [Home v. Nugent, 74 Miss. 102, 108.] It has been said that under the rule of *caveat emptor,* and as a necessary result of it, "the money produced at a sheriff's sale is to be regarded, not as the money of the purchaser, but as that of the defendant in the *fi. fa.*" [Lowe v. Rawlins, 83 Ga. 320.] Again it is held that

Digitized by Google

if a bidder at a sheriff's sale gets no title and makes it known *before* the sale is confirmed, he will be released. [Williams v. Glenn, 87 Ky. 87, 89.] Then we have in this State the well known case of Valles Heirs v. Fleming's Heirs, 29 Mo. 152, wherein it is held that a purchaser at an administration sale of land encumbered by a mortgage whose bid has been used to pay the mortgage debt will be subrogated to the rights of the mortgagee. And it has been held that the heirs will not be permitted to set aside an administration sale of real estate where the purchase money went to discharge debts of the estate, without refunding the purchase money. [Throckmorton v. Pence, 121 Mo. 50, 57; Davis v. Gaines, 104 U. S. 386.]

So in McLean v. Martin, 45 Mo. 393, where the sheriff by mistake misdescribed land as belonging to the execution creditor and so sold it to a purchaser who also supposed it was the debtor's; and the debtor, joining in the mistake, supposing his land had been sold surrendered possession to the purchaser who entered and made improvements, it was held, in an opinion by WAGNER, J., that the doctrine of *caveat emptor* did not apply to such a case.

But these cases have not been allowed to affect the full application of the rule in this State. Thus in Cashion v. Faina, 47 Mo. 133, it was held, the opinion also by Judge WAGNER, that at a partition sale by the sheriff there was no warranty and a purchaser must pay a note for his bid though he got no title. And in Schwartz v. Dryden, 25 Mo. 572 (the opinion being by the Judge who wrote Valles Heirs v. Flemings Heirs, supra) it was held that there could be no abatement of the price though there was no title to a part of the land sold. The same was held in Stephens v. Ells, 65 Mo. 456 and Shannon v. Mastin, 134 Mo. App. 50.

In Talley v. Schlatitz, 180 Mo. 231, 239, it is said that in a sale by the sheriff the owner of the land intends nothing, and that the law through its officer, the

Digitized by Google

sheriff, "acts in hostility to him," and that "the rule of *caveat emptor* applies to all execution sales." The same is decided in Clark v. Cooper, 148 Mo. App. 230 and McNamee v. Cole, 134 Mo. App. 266, 274.

Manifestly these cases announce a rule that a purchaser at execution sale in this State is in the position of him who receives a quit claim deed; he gets what he may and must pay the price. And this is the prevailing rule. [Peterborough Bank v. Pierce, 54 Neb. 712, 719; McCartney v. King, 25 Ala. 681; Goodbar v. Daniel, 88 Ala. 583; Lewark v. Carter, 117 Ind. 206; Lewdars v. Thomas, 35 Fla. 518; Smith v. Painter, 5 Serg. & Rawle 223.] In the last of these cases it was said: "The sale by sheriff excludes all warranty; the purchaser takes all risks; he buys on his own knowledge and judgment; *caveat emptor* applies, in all its force, to him. If this were not the law, an execution, which is the end of the law, would only be the commencement of a new controversy; the creditor kept at bay during a series of suits, before he could reap the fruits of his judgment and execution. A party may sell his claim to lands, whatever they may be; and if there is no covenant other than an express stipulation that he sells only his own interest, unless he has been guilty of some misrepresentation as to the intent or some fraudulent concealment, he may recover the purchase money. Lands, at sheriff's sale, are frequently sold greatly below their value, because the usual understanding is, that the purchaser takes his chance of the title."

The foregoing rule presupposes that no fraud is practiced; and in some jurisdictions mistake of fact, especially if it be mutual, will relieve the purchaser. But if that rule be conceded to exist in this State, it would not apply to this case, since here the fact which made the execution void (the death of the plaintiff) was known to the purchaser; the mistake he made in supposing the execution to be valid, was one of law,

Digitized by Google

and a mistake of law by a purchaser at an execution sale will not relieve him. [Burns v. Hamilton, 33 Ala. 210; Arnold v. Donaldson, 46 Ohio St. 73, 81.] "Even courts of equity will not relieve in an independent action, from a mistake of law where it is not accompanied with special circumstances—such as misrepresentation, undue influence, or misplaced confidence. And courts of law are less indulgent than courts of equity in such case. 'It is well settled,' says Greenleaf, after speaking of the recovery of money paid under mistake of facts, 'that money paid under a mistake or ignorance of law of our own country but with a knowledge of the facts, or the means of such knowledge, cannot be recovered back.'" [Boggs v. Hargrove, 16 Cal. 559, 565.] This is illustrated in this State. Thus in Needles v. Burk, 81 Mo. 569, it was held that a father paying damages caused by his infant son setting out a fire under a mistaken belief that he was legally liable, in the absence of fraud, could not recover the money back. In Couch v. Kansas City, 127 Mo. 137, the plaintiff paid taxes on property in extended city limits, under the mistake that the extension was valid and it was held he could not recover them back. See also Campbell v. Clark, 44 Mo. App. 249, where the question is discussed by the St. Louis Court of Appeals.

But it has been held that the rule *caveat emptor* will not apply where the judgment or execution is *void* and consequently no power of sale exists. [McGee v. Wallis, 57 Miss. 638, 646; Howard v. North, 5 Tex. 290, 315; Dufour v. Camfranc, 11 Martin 607; Bailey v. White, 13 Tex. 114; Burns v. Ledbetter, 54 Tex. 374, 382; S. C. 56 Tex. 282, 284; Dutcher v. Hobby, 86 Georgia 198.] In Bailey v. White, just cited, the court said that "Where a sale has been made on an invalid execution, issued on a valid judgment, and the money paid has been applied to the satisfaction of the judgment and there has been no fraud, the purchaser

Digitized by Google

will not be compelled to restore the property purchased until reimbursed the amount paid by him." That case was affirmed in 54 Tex. 374, supra, where the purchaser was not a party to the suit. But in 56 Tex. l. c. 285 supra, it is held that if such party should have himself purchased, either by himself, or through his attorney and thereby apparently satisfied the judgment without any gain to himself or loss to the defendant, "he could on motion have had the satisfaction set aside, or have maintained an action on the judgment as unsatisfied."

The question was discussed by Mr. Justice FIELD, then Ch. J. of the Supreme Court of California, in Boggs v. Hargrove, 16 Cal. 559, l. c. 564, where the conclusion is reached that the rule of *caveat emptor* does not apply to *void* sales. We have already shown that it was held in that case that a purchaser at an invalid execution sale knowing the facts, could not be aided either in law or equity in an *independent* action. But the conclusion was reached (Ps. 565, 566) that he was entitled to relief in the suit in which the sale was made, provided there is a timely application and no prejudice to the rights of others exists.

So therefore, while recognizing that the rule of *caveat emptor* is in full force in this State and the rule that our courts will not grant relief for mistake of law, yet we think the foregoing considerations justify us in holding that the former does not apply where the sale is void; and the latter does not apply where such is the character of the sale and relief from the purchase is sought in the action out of which the sale grew. In so holding we are not disturbing that array of authority which likens a sale *caveat emptor* to a conveyance by quitclaim deed. For while the vendee in a quitclaim deed must beware and will receive no reimbursement if he gets nothing, yet he is entitled to a *valid* quit-

Digitized by Google

claim, and if for any reason it is a void instrument, he may go upon his vendor on *that* account.

We are aware of the embarrassments that may at times, flow from this view. There are instances when the question whether a judgment, or an execution, is void, is difficult to determine; the plaintiff in the writ may think it valid the defendant may think it void and a speculative purchaser may be doubtful and willing to take the risk by bidding the amount of the debt. In Valles Heirs v. Flemings Heirs, 29 Mo. 152 supra, where, as has been stated above, the purchase money of the bidder at an invalid administration sale went to discharge a mortgage, and it was held the owner could not maintain an action for the land, thus freed of the mortgage, without refunding the purchase money, yet, even in that character of case, Judge Scott dissented, stating that such view "may work changes in our system which no one can foresee." And in Burns v. Ledbetter, 56 Tex. 282 supra, the decision that a purchaser at an invalid execution sale whose bid had been applied to discharge the judgment, was entitled to have it refunded, was acquiesced in by Stayton, J., on the ground of *stare decisis*. He said, "Were the question an open one in this court, I am of the opinion that it would be a better rule to deny relief to a mere volunteer who purchases at an execution or judicial sale, under the facts presented in this and similar causes."

In Frost v. Atwood, 73 Mich. 67, 73, the right of a volunteer purchaser to reimbursement is repudiated altogether. The court said that, "Every one is bound to satisfy himself of the authority under which a judicial sale is made, and buys at his peril. It would be a contradiction in terms to hold a sale void for want of authority to make it, and yet valid enough to create a lien for the purchase money. Where individuals sell their own lands and receive pay for them, there can be no want of authority and the question is only one of title. But a sale made by quitclaim deed, without cove-

Digitized by Google

nants, and without fraud or misrepresentation, does not entitle the purchaser to reclaim his money. This bill is an attempt not only to give to a void probate sale the effect of a warranty deed, but to go further, and bind the land itself, which was sold without right, for its repayment."

There is no doubt that some courts, without expressly stating it, have allowed to execution sales the force of a warranty, when none was given, or could have been given by the officer, except on his personal responsibility; and thus, it seems to us, have unwittingly put the bidder in as good position as if he had purchased from an individual with warranty.

We have no disposition to criticise that line of cases in this State holding that the purchase money at invalid judicial sales which went to discharge a lien on the lands of an estate should be refunded by the heir as a condition to his right to recover such lands, as in Valles Heirs v. Flemings Heirs and Throckmorton v. Pence, supra, or where there has been an innocent mutual mistake of fact, as in McClean v. Martin, supra. Our holding here is that while the rule of *caveat emptor* at execution sales is in force in this State, it does not apply to cases where the writ is void; in such instances the purchaser, whether he be the plaintiff in the writ or his attorney, or a third party, may go into court in that case and be relieved of his purchase. We have already seen that the purchaser in the case at bar, did seek and obtain relief in the court which had rendered the judgment and issued the execution.

If this case presented an instance in which defendant was claiming the sale to be void, and yet insisting that the price bid should be credited on the judgment, he perhaps, would not be allowed such inconsistent position (Kleber Void Judicial & Ex. Sales Secs. 393, 374, 475; Rorer Judicial Sales sec. 190). But that character of case is not presented by the record and hence

Digitized by Google

we pass it by. We have not discussed Bailey v. Buchanan, 126 Mo. App. 190, cited by plaintiff, since we consider it not applicable on the facts.

The judgment is affirmed. All concur.

ARETTA THOMPSON, Respondent, v. WHITE SEWING MACHINE CO., Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **CHATTEL MORTGAGE: Conversion: Repair: Possession.** A sewing machine company sold to a purchaser a machine and took a note, secured by chattel mortgage on the machine for the balance of purchase money payable on demand. All was paid but balance of $8. The purchaser delivered the machine to the company to be repaired. The company repaired it but refused to deliver back to the purchaser until the balance on the note then past due, be paid. The purchaser then brought action in conversion for the value of the machine. It was held that the company had the right to hold possession and conversion would not lie.

2. **———: Possession for Repair: Redelivery.** A mortgagee in a chattel mortgage has the legal title after default in payment of the note secured, and is entitled to the possession. And the fact that he obtains that possession for the purpose of repairing the chattel does not deprive him of the right to refuse to redeliver until payment is made.

3. **———: Demand: Refusal of Possession.** A note payable on demand secured by chattel mortgage will be considered to be demanded by the refusal of the mortgagee to deliver possession of the chattel unless the note is paid.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

REVERSED.

A. Bowers for appellant.

Thompson, Griswold & Thompson for respondent.

Digitized by Google

ELLISON, P. J.—Plaintiff's action is for trover and conversion of a sewing machine. She recovered judgment in the circuit court for sixty-two dollars.

It appears that plaintiff bought the machine from defendant for seventy dollars putting in her old machine for $28, and executing her note due on demand for $42 balance, payable in monthly instalments of $3, and a chattel mortgage securing payment of the note wherein possession was reserved to her; but providing that if the note was not paid when due, possession could be taken by defendant. After she had paid all but a balance of $8 on the note, the machine became out of order and she requested defendant to take it for repair. They did so, and after repairing it, refused, on her demand, to redeliver until she paid the balance on the note. At this time the last installment had been due more than a year.

We cannot see any legal ground upon which plaintiff should be allowed to maintain her action. After default in the payment of the note according to its terms, defendant became the legal owner and entitled to the possession of the property. [Robinson v. Campbell, 8 Mo. 364; Bowens v. Benson, 57 Mo. 26; McCandless v. Moore, 50 Mo. 511; Lacy v. Gibson, 36 Mo. 320; Edmonston v. Jones, 96 Mo. App. 83; Turner v. Brown, 82 Mo. App. 30.]

Defendant had a right to enforce that possession by an action at law, and we do not see why, if it finds itself in peaceable possession, it should surrender such possession to the mortgagor so as to force itself to bring an action for the property. This mortgage contained also a clause giving defendant a right of possession if it was misused by plaintiff, or if defendant felt it necessary or its better security. The fact that defendant obtained possession to repair did not estop it from asserting the rights secured by the mortgage. A default in payment might occur while the mortgagee is repairing, or the mortgagee might discover while re-

Digitized by Google

pairing that other conditions of the mortgage were broken. It seems absurd to say he is to go through the form of delivery back to the mortgagor before asserting his right.

It is suggested that the note was not due until demand and therefore as no demand had been made the mortgage condition was not broken. This is not true in point of fact. Defendant refused to deliver the machine unless the balance on the note was paid. This was a demand.

The judgment is reversed. All concur.

KANSAS CITY MASONIC TEMPLE COMPANY, et al., Respondents, v. ALFRED E. YOUNG, et. al., Appellants.

Kansas City Court of Appeals, May 4, 1914.

1. **INJUNCTIONS: Pleading: Sufficiency of Petition to Support Judgment.** A petition brought by different parties having a common interest in having a publication prevented by injunction and stating facts showing that property rights of one of the parties and personal rights of the others and of all of them will be infringed upon, and the public will be defrauded if the publication be not stopped, sufficiently states a cause of action to support a judgment in the absence of a specific and timely attack made thereon. All of the plaintiffs had a common right to have the publication stopped. By one and the same wrongful act the same injury comes to all.

2. **———: ———: Improper Joinder of Parties: Multifariousness: Waiver.** Even if a petition is multifarious and contains parties improperly joined, yet, if defendant answers and goes to trial the defects of the petition are waived.

3. **———: ———: Appeal Without Motions for New Trial or in Arrest.** Where no motion for new trial or in arrest is filed, the appellate court can only examine the record proper. And in such case the court cannot disturb the judgment except for fatal error apparent on the face of the record such as that the court had no jurisdiction of the subject-matter or of the parties

Digitized by Google

or that the petition wholly fails to state a cause of action. Mere defects or irregularies not going to the very life of the judgment will not, in such case, be passed upon.

Appeal from Jackson Circuit Court.—*Hon. Jos. A. Guthrie,* Judge.

AFFIRMED.

A. S. Marley for appellants.

Jamison, Hutchinson & Ostergard for respondents.

TRIMBLE, J.—This is an appeal from a decree making permanent a temporary injunction theretofore granted. No motion for new trial nor in arrest of judgment was filed. The appeal was taken without them. In such case, while the appeal can be thus taken, there is nothing before us but the record proper. [Newton v. St. Louis and San Francisco Railroad Co., 168 Mo. App. 199; R. S. Mo. 1909, Secs. 2040, 2041 and 2083.] The office of a motion in arrest is to call the court's attention to error patent of record; and such error must be intrinsic to, and not *dehors,* the record; and the error must be one of substance and not of form. The most to be said of a motion in arrest is that if one be not filed and passed upon by the trial court, an appellate court will not consider matter of error to which the trial court's attention could only be called by a motion in arrest. [Stid v. Railroad, 211 Mo. 411, l. c. 415.] However, as section 2083, Revised Statutes 1909 requires us to examine the record, we must do so, but unless the petition is wholly insufficient to support any judgment of the nature rendered, or unless the judgment is outside of or not based upon the issues raised by the pleadings, we are not authorized to disturb it, however irregular it may be, in view of the fact that the attention of the trial court was in no way called to such irregularities or errors of form, and no oppor-

Digitized by Google

tunity was given said court to correct them. For fatal error apparent on the face of the record, such as that the court has no jurisdiction of the cause or parties, or that the petition fails to state a cause of action, the court will reverse, but not for mere defects and irregularities. [McIntyre v. McIntyre, 80 Mo. 470, l. c. 473.] The Supreme Court has refused to reverse for errors of misjoinder of parties and causes of action. [Ames v. Gilmore, 59 Mo. 537.] Proceeding then to the question of whether the record discloses errors fatal to the judgment, we find none. The court clearly had jurisdiction of the subject-matter and of the parties. Consequently, unless the petition wholly failed to state any cause of action or unless the judgment is entirely outside of, and not based upon, nor authorized by, the pleadings, the decree must stand.

The amended petition on which the case was tried alleged that the Kansas City Masonic Temple Company was erecting a building of $150,000 in value, wherein the various Masonic Lodges in Kansas City, and the members thereof, might hold meetings; that the personal plaintiffs are members of such lodges and as such are interested in the Kansas City Masonic Temple Company; that when said structure is completed it is to be dedicated at some date in the near future not yet known; that defendants as managers and owners of the Masonic World Publishing Company are about to issue a publication immediately prior to and at the time of the dedication of said temple and thereafter, purporting to be an official publication authorized by said Temple Company and to be sold and distributed as a souvenir of the occasion of such dedication, containing a picture of said Temple with a description thereof and portraits and biographical sketches of the officials and other leading Masons throughout the State; that defendants were soliciting subscriptions to said publication from various members of the Masonic orders and representing to them that defendants were author-

Digitized by Google

ized by the Temple Company to do so; and that defendants had agreed to contribute one-half of the proceeds to the furnishing of said Temple, all of which was untrue. That said Temple Company not only had not given defendants such authority but had refused to give it; that said defendants' propose to put in said publication sundry advertisements, all without the authority, supervision, or control of plaintiffs or any of them, to the injury of plaintiffs and their business and property rights particularly of the said Temple Company; that other members and persons were being induced to subscribe and pay money to defendants by representations that the Temple would get one-half of their subscriptions; that not only are plaintiffs' property rights being infringed upon but the issue and publishing of such publication with the pictures and biographies proposed to be published in connection with the promiscuous advertising, would tend to injure and bring into contempt and ridicule plaintiffs and each of them; that they were without adequate remedy at law and would suffer irreparable injury if said publication be permitted to issue. Wherefore an injunction was prayed to stop the solicitation of subscriptions and the representations that the publication was by the consent or under arrangement with the building committee of the Temple Company and the representations that said Temple Company would get one half of such subscriptions, etc.

The answer was a general denial, a plea that plaintiffs' petition stated no equity and that they had an adequate remedy at law.

The objections going to the petition, when boiled down to their last analysis, are that the Temple Company and the personal plaintiffs are improperly joined, and that the petition is multifarious. If this be true, nevertheless, defendant having answered and gone to trial, waived the same. [R. S. Mo. 1909, Sec. 1804; Jordin v. Transit Co., 202 Mo. 418.]

Digitized by Google

But we do not think the petition is multifarious or that it wholly fails to state a cause of action or that the judgment is outside of the issues raised by the pleadings. The plaintiffs all had a common interest in having the publication suppressed and the untruthful representations stopped. The bill was not therefore multifarious. [14 Ency. of Pl. and Pr. 200-201.] It is only when the interests of plaintiffs are conflicting that their joinder is objectionable; and where one general right is claimed and there is one common interest among all the plaintiffs their joinder is proper. [10 Ency. of Pl. & Pr., 906.] Even though the manner in which the various plaintiffs' right arise may be in a sense distinct, yet, if they have a common interest as to the point at issue the bill is not multifarious. [Perkins v. Baer, 95 Mo. App. 70. See also Rinehart v. Long, 95 Mo. 396; Westinghouse Air Co. v. K. C. Ry. Co., 137 Fed. 26.]

An analysis of plaintiffs' petition clearly shows that they all are seeking the same object, the suppression of the publication and the stopping of the unauthorized solicitation of subscriptions on the strength of the representation that it was authorized by, and would benefit, the temple in which all of the plaintiffs were interested. The personal plaintiffs' right to have the publication stopped may be in a sense distinct, that is, have a different source, from the right of the Temple Company to have it stopped, but it is not necessary that their rights should all spring from the same source. It depends upon their unity and community of right to have it stopped. By one and the same wrongful act act the injury comes to all.

The petition stated a cause of action. All of the plaintiffs had a right to protect themselves from entanglements that would subject them to criticism or bring them into disrepute. They had the common right to prevent their names and pictures from being used as a means to induce persons to subscribe money

Digitized by Google

to defendants' schemes. Not only would the Temple Company and the other plaintiffs be blameworthy if they allowed defendants to secure subscriptions under such false representations, but the ability of the Temple Company and the members of the Masonic orders (which are social and benevolent in their nature) to raise money for the prosecution of their benevolences would be seriously impaired. In addition to this, the representation that the Temple Company had authorized and would profit by it was a fraud on the public and the proposed publication could be enjoined on that ground. [22 Cyc. 844; Gaines & Co. v. Fruit & Wine Co., 107 Mo. App. 507; Goodyear v. Goodyear, 128 U. S. 598; Grocers Journal Co. v.Midland Publishing Co., 127 Mo. App. 356; Cemetery Assn. v Cemetery Assn., 246 Ill. 416; Avenarius v. Kernley, 139 Wis. l. c. 267.]

If the petition stated a cause of action at all, however defectively it is sufficient to sustain the judgment. We think that the petition showed that the plaintiffs not only had a common interest and right to be conserved and protected but that it grew out of one and the same act which all sought to prevent. The judgment is affirmed. All concur.

HENRY C. GEORGE, Admr. of the estate of ANDREW P. GEORGE, deceased, Defendant in Error, v. QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY, Plaintiff in Error.

Kansas City Court of Appeals, May 4, 1914.

1. **NEGLIGENCE: Railroads: Statute Requiring Blocking of Switches: Meaning of Term "Yards."** In Sec. 3163, R. S. 1909, relating to the blocking of switches, the term "yards" includes the place or piece of ground surrounding a depot or station which is used to switch or stand cars thereon for the purpose

Digitized by Google

of loading or unloading freight at that point and for other purposes connected with the railroad business transacted at such station. While the term "yard" may technically have a narrow meaning yet, as it in common parlance has a broader meaning, and there is nothing in the statuee showing an intention to use the term in a limited sense, but on the contrary there is enough to indicate that the broad and general rather than the limited, meaning was intended, such term should be taken and considered as used in its usual ordinary, and general signification.

2. ———: ———. Said statute does not contemplate that a railroad company, erecting a switch after September 1, 1907, shall have a reasonable time, after putting such switch in use, in which to block it, but that it must be blocked when erected and put in use. So that, where a switch was erected and shown by all the evidence to have been in use after the statute was in force, a defense that the railroad had not had a sufficient time to block it after putting it in use, was properly stricken out.

3. ———: ———: **Defense of Contributory Negligence.** Sec. 3164, R. S. 1909, takes away the defense of contributory negligence in a case based on the failure to obey the statute in reference to blocking.

On Rehearing.

1. **PLEADING: Cause of Action: Appellate Court.** If a petition purports to state a cause of action on a statute and such statute is void for uncertainty, then no cause of action is stated and advantage may be taken of it for the first time in the appellate court.

2. **STATUTE: Uncertain or Impossible to Execute: Void.** A statute may be couched in such unintelligible, contradictory or inconsistent terms, as will render it void. And though its terms are certain and intelligible, yet, on the face of it, compliance may be impossible and for that cause also it will be void.

3. ———: **Best Known Appliances and Inventions: Validity.** A statute requiring railway companies to provide the "best known appliances or inventions to block switches in railroad yards to prevent as far as possible the feet of employees or other persons from being caught therein," is not void, either for uncertainty, or impossibility of compliance.

Digitized by Google

Error to Adair Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

AFFIRMED.

Campbell & Ellison, J. G. Trimble, Willard P. Hall for plaintiff in error.

Charles E. Murrell and *Fogle & Fogle* for defendant in error.

TRIMBLE, J.—On the 7th of November, 1907, Andrew P. George, a brakeman on appellant's road, having switched, out of his train, a car from the main line to the house track at defendant's station in Kirksville, was engaged in recoupling the two separated portions of the train, from which the car had been switched, when his foot caught in an unblocked frog where he was working, and, as a result thereof, he was run over and instantly killed.

He was an unmarried man, over 21 years of age, living with his mother, and having several brothers and sisters.

The plaintiff is his administrator, and in this action sues to recover damages, in the sum of ten thousand dollars, for his death.

The cause of action is based upon a failure to obey section 3163, Revised Statutes 1909, which required appellant, on or before September 1, 1907, "to adopt, put in use and maintain the best known appliances or inventions to fill or block all switches, frogs and guard rails on its road, in all yards, divisional and terminal stations, and where trains are made up, to prevent, as far as possible, the feet of employees or other persons from being caught therein." Section 3164, Revised Statutes 1909, takes away from a defendant railroad company, violating or failing to obey said statute, the defense of contributory negligence.

Digitized by Google

The answer was a general denial containing, in addition two special defenses, namely: 1. That the track at the frog in question had been laid since September 1, 1907, but just recently and immediately before the 7th of November, 1907 the date of the injury, and was at that time still in process of construction and defendant had not a reasonable time in which to ballast and surface the track and block said frog. 2. Contributory negligence on the part of the deceased. The court, on motion of plaintiff, struck out said special defenses, the defendant excepting.

Under appropriate instructions the question whether the frog was blocked or not, as well as the question whether deceased's foot was caught therein because of the absence of such block, were submitted to the jury and, by its verdict in plaintiff's favor, these questions must be considered as being now beyond dispute.

The assignments of error with which we have to deal, are, in substance, that the statute does not apply to this case that the court erred in striking out the two special defenses and in excluding the evidence offered in support thereof, and that the court erred in not sustaining a demurrer to the evidence.

The point that the statute does not apply to this case is based upon the claim that the frog in question was not located at a point where it is required to be blocked, defendant contending that the statute requires only those frogs and switches to be blocked which are situated "in yards, divisional and terminal stations, and where trains are made up" and that the frog in question was not situated in any of such places but on defendant's main line.

The deceased was killed at a point about one hundred yards west of defendant's depot and station in Kirksville. The frog in which his foot was caught was at the switch where the house track left the main line and thence ran east around the south side of the depot

Digitized by Google

and joined the main line again at another switch about one hundred yards east of the depot. From this east switch there was a stock track lying north of the main track (which ran east and west), and leading west to the stock yards. A short distance west of said east switch there ran from said house track, a transfer track, lying south of the house track and leading around in a curve to the south east to where it connected with the Wabash railroad which intersected defendant's line a short distance west of the place where deceased was killed. South of and parallel to this transfer track, and also leading from the house track, was still another track which ran around past the electric light plant down to where it also joined the Wabash railroad. From this last track a spur track ran out to some coal sheds. Defendant's water tank was located on the main line near the intersection thereof with the Wabash railroad.

The foregoing statement of the location of the depot and various tracks, with reference to the place where deceased was killed, is made for the reason that it bears on the question whether the frog where deceased was killed was within a "yard" or place where the statute requires it to be blocked. The statute is a penal statute and must be strictly construed. Hence if the place where the injury occurred is not within one of the places enumerated by the statute, it can have no application.

Kirksville was not a divisional or terminal station, and it is defendant's contention that the term "yards" as used in the statute has reference only to such yards as are maintained at a railroad's divisional or terminal stations, or where many parallel tracks are maintained and cars are habitually and constantly switched back and forth therein; and that said term "yards" does not mean the grounds, commonly spoken of as yards, used in connection with an ordinary station on the line.

Digitized by Google

We do not think the term "yards" in the statute should be given such a narrow and limited technical definition, unless there is something in the statute itself requiring such definition. In the absence of anything to show a contrary meaning, words used in a statute should be taken and considered as used in their usual, ordinary and general signification. Everyone knows that every railroad station has a "yard" of its own by which is meant a place or piece of ground, usually within certain reasonable limits though not necessarily inclosed, surrounding the depot or station, and used to switch and stand cars therein for the purpose of loading or unloading freight handled at that point, and for other purposes connected with the railroad business transacted at such station. Such place, in ordinary language, used by the persons in charge of such stations as well as by the public doing business thereat, is termed a "yard." And in it there is always more or less switching to be done in order to deliver and take away cars at said station. Not only is it common knowledge that such place adjacent to a station is called a yard, but there was evidence to that effect. Defendant's definition of the term "yard," while it may mean primarily what defendant contends it does, may also include the larger meaning, since, under that rule, "a yard is a system of tracks within defined limits provided for the making up of trains, *storing of cars and other purposes,* over which movements not authorized by time table, or by train order, may be made subject to prescribed signals and regulations." But even if such definition does not include what is ordinarily termed a "yard" at a railway station, yet if the statute means to include such as a yard, the scope of the statute cannot be limited by the adoption of a rule restricting the definition of the term "yard." There is nothing in the statute indicating that the term "yards" was not intended to mean whatever are termed yards in ordinary parlance when ref-

Digitized by Google

erence is had to railroads. On the contrary, there is enough in the statute to indicate that it intended said term should have the broad and general, rather than the limited, meaning. Because, instead of saying "in yards where trains are made up," it says "in *all* yards, divisional and terminal stations, *and* where trains are made up." That the term should have a broad rather than a limited meaning is also shown in the expressed purpose of the required blocking, which was "to prevent, as far as possible, the feet of employees or other persons from being caught therein." This is also shown in the fact that the statute applies to the owners or operators of any railroad or *part* of railroad in the State. That is, it is not conceiveable that a statute, the purpose of which is to prevent as far as possible the feet of employees being caught, should require blocking only where there was danger to the employees working constantly all day long and every day, and not require it where there was danger to employees wherever they usually, customarily and ordinarily, though not constantly, were expected to switch cars when the business of the road required them to be switched.

It will be observed that the place where deceased was killed was in a "yard" within the meaning of that term as ordinarily used. There was a switch about one hundred yards east of the depot and one about the same distance west of the depot. These two switches marked the limits of the yard at that place. There was a system of tracks there where cars could be cut out of a train and either stored on said tracks to be loaded or unloaded or turned over to the Wabash railroad to be transported on its line. Over these tracks cars could be taken from the Wabash, and other cars standing in the yard at said depot could be placed in the train and carried away. And over these tracks, in the language of defendant's definition of a yard, "movements

Digitized by Google

not authorized by time table, or by train order, may be made subject to prescribed signals and regulations." All the above storing, taking away and transfer of cars required more or less switching as a usual and regular routine of business, though not requiring employees to be engaged thereat constantly all day and every day. In other words, switching was *customarily* or habitually, though not *constantly,* required there. And it was while deceased was engaged in cutting out a car and coupling his train together again in such a place, that he was killed. We cannot say the statute does not apply to such a place.

The next complaint is that the court erred in striking out the two special defenses. The house track leading from the depot to the main track at a point west of the depot had formerly turned in a short curve and joined the main track at a point much closer to the depot. This short curve was to avoid a pond. Prior to the accident this pond had been filled, and the house track extended further west before it joined the main track, causing the switch to be moved from where it had been to the point where deceased was killed. This portion of the house track laid over the site of the pond was a skeleton track, that is, the ties and rails were in proper place and also the switch so that it could be used, and was in use, but the ballast had not been filled in between the ties and possibly levelled and made smooth. The track and switch in question were put in, in August, 1907, and at that time the law was already in force requiring the switch to be blocked by September 1, 1907, it remained unblocked after September 1, 1907, in violation of the statute, down to November 7, 1907, when deceased was killed and was not blocked until in June, 1908. The statute contemplates that after September 1, 1907, a switch *in use* must be blocked. It does not contemplate that a switch can be erected and put in use, and that the railroad can, after putting it in use, have a reasonable time

Digitized by Google

in which to block. But that when a switch or frog is put in use it must be blocked at that time. The defendant did not dispute the fact that the switch was being used. Hence nothing could be accomplished by reversing and remanding the case on this point.

The other special defense stricken out was that of contributory negligence on the part of deceased. But, under the statute, contributory negligence constituted no defense. [Sec. 3164, R. S. 1909.] The judgment is affirmed All concur.

ON REHEARING.

ELLISON, P. J.—This case has been again considered and we are satisfied with the foregoing opinion, delivered by Judge Trimble at the first hearing.

But a point, not before discussed, has been presented. It relates to the validity of the statute; defendant claiming it is void for uncertainty. Preliminary to considering that question we will dispose of plaintiff's claim that defendant should not be allowed to raise that objection in this court, since it was not made by answer, or otherwise, at the trial. Plaintiff has likened defendant's right to cases where the claim has been made that a construction of the constitution was involved. The rule, in the latter instance, being that the claim must be made at the first proper opportunity. [George v. Railroad, 249 Mo. 197, 199; and cases cited; Hutchinson v. Morris Bros., 190 Mo. 673, 677.] We think the instance of a constitutional question, relating, as it does, to the jurisdiction of the Supreme Court and Courts of Appeals is not analogous to the question of the invalidity of a statute for other grounds than its being unconstitutional. If a court has jurisdiction of a case, except for some matter which may or may not be involved, as the party concerned may elect, he must present that question at his first opportunity, else he concedes it is not in the case. But if there is no question of jurisdiction, the defendant

Digitized by Google

may attack the validity, or the construction of the law, on any ground not involving its constitutionality.

In this State, it has ever been the rule that the question whether a petition states facts sufficient to constitute a cause of action is not waived by failing to make objection by demurrer or answer; and it may be raised for the first time in the appellate court. [Chandler v. Railroad, 251 Mo. 592; Burns v. Patrick, 27 Mo. 434; Childs v. Railroad, 117 Mo. App. 414; State Ex Rel. v. Bland, 144 Mo. 534.] Now if the statute in controversy is void for uncertainty, or is void for impossibility of execution, then a petition based upon it does not state a cause of action, and hence advantage may be taken of such fatal defect, on appeal though not before mentioned.

The statute in dispute, section 3163, Revised Statutes 1909, is quoted in the forepart of Judge TRIMBLE's opinion and the question we have now to determine is whether it is valid. Defendant claims it is void for uncertainty. We take some exception to defendant's mode of stating its objection. Neither the words nor the meaning of the statute is uncertain. Indeed, we think the very certainty of its expression and meaning is the thing that gives defendant a basis for the contention that it is void. That is to say, it so clearly commands the performance of the acts specified that their performance is said to be an impossibility, and in consequence the law is void; and that is really the course of defendant's argument. The particular parts are these words; that the company shall use "the best known appliances or inventions to fill or block all switches . . . to prevent, as far as possible, the feet of employees being caught therein." Now there evidently is no uncertainty about the words and the meaning of the statute. It is undoubtedly true that "Where the statutory terms are of such uncertain meaning, or so confused, that the courts cannot discern

Digitized by Google

with reasonable certainty what is intended, they will pronounce the enactment void." [State v. Light Co., 212 Mo. 101, 110.] But that is not the condition in this case. We have not here a lot of words thrown together in such a way as not to be intelligible. Nor is it a direction in intelligible language of a number of incongruous, inconsistent and self contradictory matters, as was the statute discussed and held void by the Supreme Court in an able opinion by Judge WILLIAMS, in State ex inf. v. Street Ry. Co., 146 Mo. 155.

But though the words in question are intelligible, the question remains, is it impossible in any reasonable practical application, to comply with it. For, if a statute is such that it is "impossible to comply with its provisions it will be held to be of no force and effect." [People v. Briggs, 193 N. Y. 457, 459; State v. Partlow, 91 N. Car. 550.] So the objection to this statute is that it is not possible for railway companies to comply with it. Defendant asks: "What is the best known appliance or invention for this purpose? How is it to be ascertained? Who is to decide it? It is perfectly clear that the statute is too uncertain to be enforced. What one court or one jury might decide to be the best known appliance or invention another court or jury might decide not to be the best known appliance or invention. It is utterly impossible for anyone from time to time, or at any time, to ascertain what is the best known appliance or invention. One court or jury might hold a railroad company liable for not blocking its frogs with a certain appliance, and another court or jury might hold the same or another railroad company liable for using the self same appliance." Our answer to this is, that the Legislature realized it was dealing with and directing human agencies, not infallible, and when it demanded the use of the best appliances it meant the best according to the careful judgment of men qualified to judge of such instrumentalities. The best known does not necessar-

Digitized by Google

ily mean that there shall be but *one* kind, or that that particular one shall be selected at the peril of the company; as there may be several of equal safety, the use of either of which would satisfy the terms of the statute. There might be several safety appliances or devices and one or more be known at a certain time as the best, as compared with the others, and yet it might be, as was said in argument, that some of the latter may, by experience and use, come to be known and considered before trial of a given case, as the best. But we do not think such considerations should prevent a practical application of the statute. Culpability of a railway company would be judged by the status of things existing at the happening of an injury. The best appliances; the best methods; the latest improvements; the best to be had in the market, are closely related expressions in common use, and their practical fulfillment in ordinary contracts of the day, has never been thought to be unreasonably difficult, much less impossible. Character of safety appliances in different conditions have been the subject of frequent discussion, and the use of terms similar to those in this statute have not been thought inapt. Thus in 4 Elliott on Railroads, Sec. 1472, "the expression is quoted from Stienwig v. Erie Ry. Co., 43 N.Y. 123, that the *most approved* modes of construction and machinery in *known* use in the business and the *best precautions in known practical use* for securing safety," was the care required in case of spark arresters; and in that case it will be seen the difficulties suggested by defendant of application of the present statute were not considered as affecting the rule stated. The same author (Vol. 3, sec. 1224) speaks of "*approved* appliances in general use." So 1 Shearman & Redfield on Negligence, Sec. 45, speaks of the law as requiring all "known tests," as to the safety of cars. In Fitch v. Railroad, 45 Mo. l. c. 327, the Supreme Court refers to the duty of a railroad

Digitized by Google

to show "that the best machinery and contrivances were used."

It is important to look to the former state of the law. [Decker v. Diemer, 229 Mo. l. c. 324.] Undoubtedly the statute was enacted to require stricter diligence and better effort to effectuate the safety of employees The rule had been as it is stated in 1 Whites Personal Injuries on Railroads, Sec. 253, that "it was not incumbent upon the employer to adopt every new invention useful in the business, which might serve to lessen the danger," and that he was "not bound to furnish either the newest, safest, or best appliances." And so our Supreme Court had stated it. [Huhn v. Railroad, 92 Mo. 440; Smith v. Fordyce, 190 Mo. l. c. 24.] This rule of mere ordinary care to select appliances reasonably safe, in the instance of switch blocks, has been changed.

But it is said the Legislature should have laid down some rule or mode, whereby the "best known appliances" might be found and selected. It is more than probable that if such task had been assumed, the force and effect of the law would have been lessened, or its "uncertainty" have been increased.

It makes nothing against the statute that different juries will not agree on the fact of what is, or which is, "the best known appliance." Different juries doubtless will do as suggested. It is the misfortune of our system which is to be laid to the imperfection of human nature. Juries make a different application of the same state of facts under our law in cases of the highest importance, yet this uncertainty of uniform result has never been assigned as ground for nullifying the law.

The point made that the motion in arrest should have been sustained because the petition did not contain the names of the beneficiaries and facts from which the measure of damages could be ascertained was not mentioned at the trial, nor in the motion in arrest. Johnson v. Mining Co., 171 Mo. App. 134, is not appli-

Digitized by Google

cable since there the point was made by demurrer. Under the Federal Liability Act it is held that the beneficiaries should be ascertained and the verdict should apportion the damages; but if that is not done and no exception taken on that account, it is waived and a verdict in a lump sum will be sustained; Hardwick v. Railroad, (not yet reported). We think the judgment should be affirmed. All concur.

D. B. KELLEY, Respondent, v. JOSEPH MORTON and PEARL MORTON, Appellants.

Kansas City Court of Appeals, May 4, 1914.

TAX BILLS: Estimate of Cost: Exceeding Estimate. Where the city charter does not limit or restrict the actual cost of a street improvement to the estimate thereof by the engineer, nor provide that the bills shall be invalid if the esimate is not accurate, the fact that the actual exceeds the estimated cost will not invalidate the tax. Under such a charter or statutory provisions, the estimate is advisory merely. It would be unjust, in such case, to deprive the contractor of the rewards of his work, after he has honestly and faithfully performed his contract, merely because the advice given by the city's engineer was not accurate.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk,* Judge.

AFFIRMED.

Joseph Morton and *H. K. White* for appellants.

Frank B. Fulkerson and *Frederick D. Fulkerson* for respondent.

TRIMBLE, J.—Plaintiff brought this suit to enforce the lien of four special tax bills for grading a

Digitized by Google

street on which defendant's lots fronted. Said tax bill were issued by the city of St. Joseph, February 28, 1911. The objection made to the validity of the tax bills is to the estimate made by the city engineer prior to the passage of the ordinance authorizing the work. In all other respects the steps taken by which the work was authorized and the tax bills issued are deemed to be regular. Nor is any contention made that the plaintiff did not do the work in the manner and within the time prescribed by the ordinance and contract. No objection was made at any time to the manner of the grading, nor is there any showing of fraud connected therewith. After the contractor had spent his money and performed the work in accordance with the ordinance and contract, defendant refused to pay said tax bills. After they had drawn interest for some time, and shortly before suit was brought, defendant tendered $70 in full payment of the bills which was not quite one-half the face of the bills not taking into consideration the interest due thereon. This tender was refused and suit was brought. The case was tried by the court, a jury being waived. Judgment was rendered for the full amount of the tax bills enforcing same upon the property described therein. Defendant appealed.

The objection concerning the Engineer's estimate is not that no estimate at all was filed but that the one that was filed was inaccurate; that when the Board of Public Works of St. Joseph approved the proposed ordinance to authorize the work and transmitted it to the Common Council of said city the estimate accompanying it, prepared by the then city engineer and filed in the office of said board, stated that the work to be done under said ordinance would amount to 16,070 yards costing $4,018; that the work actually done under the contract amounted to 29,827.45 yards at 33½ cents per cubic yard aggregating $9992.20. It is thus seen that the estimated cost was only 42 per cent of the actual cost. The question is, in the absence of any fraud,

Digitized by Google

violation of the contract or variation in the manner of the performance of the contract, does the fact that the estimate made by the city engineer varies so widely from the actual cost, render the tax bills void? If not, does it, or can it, have the effect of reducing the amount recoverable by plaintiff down to the corresponding proportion of the actual cost?

The only reference made by the city charter to any "estimate" appears in section 8838, R. S. 1909. That section provides that all petitions for grading shall be addressed and presented to the Board of Public Works which shall speedily hear and determine same. The section further provides that the board upon its own motion may, and, if a petition signed by a majority of the front feet is presented, "shall prepare an ordinance for the improvements contemplated, and submit such proposed ordinance, together with such petition or a copy thereof for such improvements, if there be a petition, together with all obections thereto or copies thereof that may have been filed with the board, with such recommendations as it may desire to make to the common council, with the full plans and estimates of the costs of the improvement contemplated." The section further provides that before such ordinance shall be submitted all persons shall be notified of the time and place when and where objections will be heard, and such notice shall contain a description of the improvement contemplated.

There is nothing in the statute saying that the actual cost shall not exceed the estimate; nor does it say that the estimate, if not accurate, will invalidate the tax bills. The accuracy of the estimate is not a condition precedent to the letting of the contract. [Probert v. Garth, 155 Mo. App. l. c. 390.] In that case ELLISON J. in speaking of an objection, that although the area had been greatly reduced still the actual exceeded the estimated cost, said: "This goes to show that the estimate was a poor one, but we do not see how it can affect the

Digitized by Google

validity of the tax bills. There are cases holding bills to be void if the work was let at a price in excess of the estimate, but those were where the work was done in cities whose charters forbid contracts in a sum beyond the estimate. No such restriction appears in the charter of cities of the second class, to which St. Joseph belongs."

Where the statute does not restrict the amount of the final assessment to the amount of the preliminary estimate, the latter is advisory merely. [2 Page and Joneson Taxation by Assessment, Sec. 819; Auditor General v. Chase, 132 Mich. 630; Moran Bros. v. Jersey City, 58 N. J. L. 144.] Being advisory only, it cannot by reason of its being a poor or inaccurate estimate, defeat and render invalid an assessment. Unless the statute is violated, it would be unjust to deprive the contractor of the rewards of his work, after he has honestly and faithfully performed his contract, merely because the advice given by the city's engineer was not accurate. As said in Sheridan v. Fleming, 93 Mo. l. c. 325, "The contractor has nothing to do with the estimate; and to say that he must go unpaid because of a mistake of the commissioners in a matter over which he has no control is manifestly unjust. The law contemplates no such results."

Of course, where the statute in express terms prohibits the letting of a contract for a public improvement in excess of its estimated cost, a different question is presented, and decisions based on such statutes are not applicable. [State ex rel., v. Bates, 235 Mo. l. c. 283.] Neither are those cases in point involving the failure to have any estimate at all when the statute says there must be one.

If the tax bills are not rendered void on account of the actual exceeding the estimated cost, we do not see upon what principle this or any other court could scale down the price to be paid the contractor for his work. If the tax bills are valid and he has performed his work

Digitized by Google

according to contract, he is entitled to his pay. If we are without authority to declare the tax bills void *in toto*, where is our authority to declare them partially void? We have no such authority. The judgment as rendered must, therefore, be affirmed. All concur.

N. H. TRIMBLE et al., PARTNERS as TRIMBLE BROS., Appellants, v. J. C. STAMPER, Respondent.

Kansas City Court of Appeals, May 4, 1914.

1. **FOREIGN JUDGMENTS: Full Faith and Credit: Jurisdiction of Person and Subject-Matter.** The judgment of a foreign court of limited statutory jurisdiction is not entitled to full faith and credit unless the jurisdiction of the court over the subject-matter and of the person is shown.

2. **EVIDENCE: Foreign Statute.** Sec. 6281-2, R. S. 1909, provide how a foreign statute may be proved. Oral proof may be offered to show the unwritten law or custom of a foreign state, but not a statute.

Appeal from Platte Circuit Court.—*Hon. A. D. Burnes*, Judge.

AFFIRMED.

A. D. Gresham and R. A. Chiles for appellants.

Wilson & Wilson and *Hughes & Whitsett* for respondent.

TRIMBLE, J.—Plaintiff sued upon a foreign judgment. The transcript thereof discloses that the judgment purports to have been rendered by the Montgomery Quarterly Court of Montgomery county, Kentucky.

Digitized by Google

Defendant pleaded that the judgment was invalid; that it was obtained by fraud; that defendant had a good defense thereto but had been prevented from presenting the same through fraud and deceit. No attack or objection was made to this defense. A reply was filed denying these allegations; a jury was waived and the cause was tried by the court.

Plaintiffs introduced the transcript of the judgment and rested. Thereupon defendant, without objection, introduced his testimony in support of the issues raised by the answer, and plaintiffs offered testimony in rebuttal. The court found for defendant. No declarations of law nor findings of fact were asked or given.

Defendant is a resident of Platte county, Missouri. The foreign judgment purported to have been rendered by the Montgomery Quarterly Court. Kentucky is a common law State and such court must be a statutory court and not a common law court of general jurisdiction. Being a statutory court, its jurisdiction is limited and defined by the statute creating it. There was no proof of such statute nor of the jurisdiction of said court. Oral proof was offered but this was excluded by the court. The statutes of another State cannot be proved in this manner. [Secs. 6281 and 6282, R. S. Mo. 1909.] The statute should be introduced. [Smith v. Aultman, 120 Mo. App. 462; Lee v. Railroad, 195 Mo. 400.] It was incumbent upon plaintiffs to show not only that a judgment was rendered in that court but that said court had jurisdiction of the subject-matter and of the person of the defendant. The judgment of a foreign court of statutory limited jurisdiction is not entitled to full faith and credit unless these matters are shown. [Thomas v. Robinson, 3 Wend. (N. Y.) 267; Kelley v. Kelley, 161 Mass. 111, l. c. 117; Hofheimer v. Losen, 24 Mo. App. 652, l. c. 659.] The fact was overlooked that the

Digitized by Google

judgment was rendered by a foreign court of inferior statutory jurisdiction not proceeding according to the course of the common law. In such case nothing can be presumed in its favor. A reading of the transcript discloses that jurisdiction of the person does not affirmatively appear on the face of the record.

There are other reasons why the judgment of the trial court should be affirmed, but the foregoing are sufficient. Its affirmance is therefore ordered. All concur.

THE FURNITURE HOSPITAL, Appellant, v. SAMUEL DORFMAN, Respondent.

Kansas City Court of Appeals, May 4, 1914.

1. **INJUNCTIONS: Trade Names and Unfair Competition.** Trade names differ from trade-marks in that no exclusive proprietary interest in the former is required to maintain injunction against infringement, while it is necessary in the case of a trade-mark. Trade names are divided into exclusive and nonexclusive trade names. The former are protected upon the same principles that trade-marks are. Nonexclusive trade names are such as are *publici juris*, open to or exercisable by all persons in their primary sense, but which in a secondary sense have come to indicate the business of a particular trader.

2. ———: ———: **Nonexclusive Trade Name in Its Secondary Meaning.** Words which, in their primary meaning are not capable of exclusive appropriation as a trade-mark, may, nevertheless, by long use in connection with the business of a particular trader come to be understood by the public as designating the business of that particular trader. And if plaintiff can prove that the name he has chosen has been so exclusively identified with his business as to indicate his business alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof he is not entitled to relief.

3. ———: ———. Unfair competition consists in passing off, or attempting to pass off, the goods or business of one person as and for the goods or business of another.

Digitized by Google

4. ———: ———: **Evidence.** No inflexible rule can be laid down as to what will constitute unfair competition by the unlawful use of a nonexclusive trade name in its secondary meaning. It is always a question of fact. The question in every case is whether or not, as a matter of fact, the name adopted by defendant has previously come to indicate plaintiff's business and whether the public is likely to be deceived.

5. ———: ———: ———: **Mere Descriptive Terms.** Names which are mere descriptive terms of the business and generic in their nature are not capable of being appropriated. If the name sought to be protected is one which may be used by everyone in an honestly descriptive and nondeceptive manner the court may declare, as matter of law, that there can be no unfair competition in the use of such terms.

6. ———: ———: ———: ———. But even descriptive terms may by long use become identified in the minds of the public with a particular trader's business, and in such cases it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other. If the name be an odd, unusual, fanciful or striking name, it may be appropriated by a trader even though it be descriptive of the business he carries on. If, for its description, it depends upon a figure of speech or an association of ideas, and is not merely a literal description of the business, it is a name that is subject to appropriation within the limits of the territory that the business serves. An unusual, novel name, likely to catch the public fancy and stick in the memory is of great value in advertising a business and is protected. Even though it be descriptive of the business, it is not necessary for the subsequent trader to use such terms in such a manner as to give his business the same catchy and attractive name, for it is easy to use descriptive terms in some other honestly descriptive way.

7. ———: ———: ———: ———: **Demurrer to Evidence.** The question of unfair competition being one of fact, a demurrer should not be sustained, where the petition is otherwise sufficient, unless the court can say, as matter of law, that the name sought to be protected is merely descriptive of the business and is so entirely devoid of novelty, originality and striking characteristics as not to be capable of being appropriated as a trade name.

8. ———: ———: ———: ———: **Name "Furniture Hospital."** The court cannot say, as matter of law, that the name "Furniture Hospital" is so purely descriptive and so usual and common as to be incapable of appropriation as a nonexclusive trade name with a secondary meaning.

Digitized by Google

9. ———: ———: ———: ———: **Addition of Other Words.** The mere addition of geographic names such as "New York," "Africa," "Asia," etc., cannot be declared as a matter of law to constitute such a difference in the names as to make the name so altered free from complaint. Similarity as well as precise identity deceives, and a nice discrimination in names cannot be expected from a busy public. And it is by the adoption of some such addition rendering the name similar, but not identical, that unfair competition is usually attempted to be perpetrated.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

REVERSED AND REMANDED.

T. A. Frank Jones for appellant.

Block & Block for respondent.

TRIMBLE, J.—This is a suit by the Furniture Hospital, a corporation, to enjoin defendant from the use of the name "New York Furniture Hospital" in connection with his business of furniture repairing at No. 1704 Troost Avenue, Kansas City, Missouri, on the ground that the name "New York Furniture Hospital" by the respondent was an unlawful use of plaintiff's trade name "The Furniture Hospital," and constituted unfair competition as against the appellant herein. The circuit court sustained a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action, and on plaintiff's refusing to plead further, rendered judgment in favor of the defendant, and plaintiff thereupon appealed.

The petition alleged that it was a corporation and since 1904 it had been conducting at 1301 East 12th street, Kansas City, Missouri, the business of furniture repairing under the name of "The Furniture Hospital" and that about March, 1913, defendant began a similar business about a quarter of a

Digitized by Google

mile distant from plaintiff's shop which he carried on under the name of "The New York Furniture Hospital"; that by reason of plaintiff's long use of the name "Furniture Hospital" and its advertisement thereof and the consequent identification of plaintiff's business with that name in the mind of the trading public of Kansas City, plaintiff is entitled to the exclusive use of the name "Furniture Hospital" in Kansas City for the business of repairing furniture; "that the use of the name 'Furniture Hospital' was intended by defendant, and apart from his intention was likely to, and did, confuse and mislead the trading public and attract plaintiff's customers to defendant's shop, and that it constituted unfair competition and is contrary to equity and good conscience." The petition further stated that by such unfair competition and by the wrongful assumption and use of plaintiff's trade name, defendant is diverting to his shop many of plaintiff's customers deceived by his use of the name, and has obtained business which would have come to plaintiff amounting to $1000.

There is no claim on the part of plaintiff that there has been a violation of a technical trade mark but that under the circumstances plaintiff has a right to designate his business by the name "Furniture Hospital" and that defendant has no right to give his business such a similar designation as will enable him to deceive and mislead the public into thinking they are dealing with plaintiff. In other words, plaintiff claims that defendant is violating the rule against unfair competition which consists in passing off, or attempting to pass off, the goods or business of one person as and for the goods or business of another. In such case no exclusive proprietary interest in the trade name is necessary to relief while in trade-mark cases an exclusive right is necessary, and this seems to be the principal distinction between the two. [38 Cyc. 763.]

Digitized by Google

Trade names are divided into exclusive and nonexclusive trade names. The former are protected upon the same principles that trade marks are. Nonexclusive trade names are such names as are *publici juris,* that is, open to or exerciseable by all persons in their primary sense but which in a secondary sense have come to indicate the business of a particular trader. [38 Cyc. 765.] The name which plaintiff in this case seeks to protect is that of a nonexclusive trade name in its secondary meaning. In 38 Cyc. 769 it is said: "Words or names which have a primary meaning of their own, such as words descriptive of the goods, or the place where they are made, or the name of the maker, and which are not capable of exclusive appropriation as a trade-mark, may nevertheless by long use in connection with the goods or business of a particular trader come to be understood by the public as designating the goods or business of that particular trader. Such words have both a primary and secondary meaning. In their primary descriptive sense, they are *publici juris,* and all the world may use them, but they must be used in such a way as not to falsely convey the secondary meaning, for this would constitute unfair competition as tending directly to pass off the goods or business of one man as and for that of another. This is what is known as the doctrine of secondary meaning. Its perception by the courts was the genesis of the law of unfair competition as distinguished from technical trade marks. In all this class of cases where the word, name, or other mark or device is primarily *publici juris* the right to relief depends upon the proof. If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning, so as to indicate his goods or business and his alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof, he is not entitled to relief.

Digitized by Google

There is an exclusive right to the secondary meaning of a name, which has been deemed a property right, in the same sense that technical trade-marks are property. This exclusive right is strictly limited to the secondary meaning of the word."

As to what will constitute unfair competition by the unlawful use of a nonexclusive trade name in its secondary meaning, no inflexible rule can be laid down. Each case is, in a measure, a law unto itself. Unfair competition is always a question of fact. The question in every case is whether or not, as a matter of fact, the name adopted by defendant has previously come to indicate plaintiff's business and whether the public is likely to be deceived. [38 Cyc. 779; Sarta v. Schaden, 125 Iowa 696, l. c. 701; Atlas Ins. Co. v. Ins. Co., 138 Iowa 228, l. c. 232; O'Grady v. McDonald, 72 N. J. Eq. 805, l. c. 807.]

Of course this rule is qualified by the further rule that names which are mere descriptive terms of the business and generic in their nature are not capable of being appropriated by any one. Hence if the name sought to be protected and claimed to be infringed upon and unfairly used is one which may be used by every one in an honestly descriptive and nondeceptive manner, the court may declare, as matter of law, that there can be no unfair competition in the use of such terms. For instance, no one could appropriate the name of "Swedish Snuff Store" or "Felt Hat Store," "Law Book Store," "Divinity Book Store" or any such name as would simply notify the public that a particular class of business or merchandise was carried on or kept there. [Choynski v. Cohen, 39 Cal. 501.]

But even descriptive terms may by long use become identified in the minds of the public with the business of a particular trader, and in such case it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of

Digitized by Google

the other. [38 Cyc. 800.] If the name adopted be an odd, unusual, fanciful, or striking name it may be appropriated by a trader even though it be descriptive of the business he carriers on. If, for its description of the business, it depends upon a figure of speech or an association of ideas and is not merely a literal description thereof, it is a name that is subject to appropriation within the limits of the territory which the business serves. Such a name is one likely to catch the public notice and fancy, to stick like a bur in the memory, and is therefore of great value in advertising a public business. There is in it an element of originality which will entitle the originator thereof to its use as against one adopting it for the purpose of securing business by reason of the similarity of the name. Because such a name may be descriptive of the business is no reason for another and subsequent trader adopting it and thereby appropriating to himself the fruits of the other's ideas and labor in building up a trade thereon. As said in 38 Cyc. 801 "It is unnecessary for the subsequent trader to use such terms in such a manner as to give his goods the same short name, or trade name, in the market as that of the prior trader's goods, for it is easy to use such terms in some other honestly descriptive way without injury to any right of either party. Accordingly such a use of descriptive terms is unfair and will be enjoined." And in the same work, 38 Cyc. p. 794, it is said: "A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival. Owing to the nature of the goods dealt in, or the common use of terms which are *publici juris,* some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition. The unnecessary imitation or adoption of a confusing

Digitized by Google

name, label, or dress of goods constitutes unfair competition. Where there is no reason for using a particular name other than to trade upon another's goodwill, such use of the name constitutes unfair competition and will be enjoined." In other words, it is not necessary for the subsequent trader to adopt the odd, unusual and striking name of the prior trader to describe the goods or business of the former. He can use descriptive terms which will not confuse the public as to the identity of the business carried on. And when this is the case the former name is not unqualifiedly *publici juris* merely because it may be descriptive of the business, but is susceptible of being a nonexclusive trade name with a secondary meaning, that is, a meaning that carries with the signification that it is the business of a particular owner.

Now, an examination of the petition will disclose that it contains all the allegations necessary to state a case of unfair competition in the use of a nonexclusive trade name having a secondary sense or meaning, provided the trade name set out in the petition is not one so absolutely *publici juris* as to be incapable of appropriation by any particular trader. And whether or not the demurrer should have been sustained would seem to depend upon the answer to this question. Consequently the case, at this stage, comes down to the question whether or not the name "Furniture Hospital" is merely descriptive of the business and so entirely devoid of novelty, originality and striking characteristics, as not to be capable of being appropriated as a trade name. For if it is so odd, unusual, striking and likely to catch the public fancy and be retained in memory as to be capable of being so appropriated as a nonexclusive trade name with a secondary meaning, then it cannot be said, as a matter of law, that by the words "New York" defendant has so clearly distinguished his name from that of plaintiff's as to remove all danger of deception to the public and

Digitized by Google

injury to plaintiff's business. The mere addition of such geographic names as "North America", "Africa", "Asia" etc., cannot be declared as matter of law to constitute such a difference as to make the name so altered free from complaint. [Creswill v. Grand Lodge, 133 Ga. 837.] Whether the business of a subsequent trader has been so distinguished as to prevent any actual or probable confusion and deception is a question of fact in each case. While it is presumed that the public uses its senses and takes note of differences, yet it must be remembered that it is by the adoption of some such addition, rendering the name similar but not identical that unfair competition is usually attempted to be perpetrated. Similarity will deceive almost as effectually as precise identity, and it is well known that nice and careful discrimination between names cannot be expected from a busy public. [38 Cyc. 790.]

So that upon the question of whether a demurrer to the petition should have been sustained, the case comes down to the inquiry whether or not the name "Furniture Hospital" is one that in law is capable of being appropriated as a trade name with a secondary meaning.

In our opinion it is, or at least it is not such a name so purely descriptive of the business as to be wholly *publici juris,* and to be declared such as a matter of law. In the first place, it is shorter, more euphonious, and striking than the prosy words "repair shop" suggestive of dust and dingy, battered old articles of uncertain age and still more uncertain, doubtful origin and history. There is a novel, figurative suggestion and association of ideas in the name "Furniture Hospital" bringing to the mind not only the idea of a homely broken article being merely mended and repaired, but also of its being tenderly cared for with a loving appreciation of its innate beauty and the possibility of restoring it to its former

Digitized by Google

finish and perfection. A lover of restored antique furniture, much in vogue now-a-days, would be much more quickly attracted to the name "Furniture Hospital" and more apt to take his ancient mohogany there for restoration, than he would to an ordinary "repair shop." He would remember the name longer too. If the evidence shows that plaintiff has built up a trade under such an attractive and catchy name and that the name has not come into such common and general use as to lose its power of identifying plaintiff's business, and that defendant by the use of that name is confusing the public as to the identity of his business with that of plaintiff's, and the latter is being injuriously affected thereby, it would seem that he ought to be protected in its use in the locality coextensive with and limited to plaintiff's market. At least he ought to have the opportunity of presenting his evidence on these questions and not be foreclosed by a demurrer to his petition. The judgment is reversed and the cause remanded. All concur.

EMMA SPEAKS, Appellant, v. METROPOLITAN STREET RAILWAY CO., KANSAS CITY ELEVATED COMPANY, ROBERT J. DUNHAM & FORD F. HARVEY, Receivers, Respondents.

Kansas City Court of Appeals, May 4, 1914.

1. **NEGLIGENCE: Boarding Moving Car at Elevated Station: No Fault Attributable to Motorman.** Where the same track at an elevated station was used by cars going in the same direction but to different destinations so that only those desiring to board a particular car would attempt to do so, the fact that a person is standing on the platform when a car approached is not sufficient to charge the motorman with notice that such person is intending to or will board the car when no signal or other intimation to that effect is given the motorman and the

Digitized by Google

car does not stop but proceeds on its way. In such case, after the car has passed the regular stopping point for the discharge of passengers at such station, the motorman has a right to presume that the rear gate of the car is closed according to rule and that he can safely resume the usual speed attained between stations. To require the motorman to know that such person would under such circumstances attempt to board the car, when every intimation was to the contrary, would be requiring superhuman powers of him.

2. ———: ———: ———: **Evidence.** Even if, by an answer to a question containing in its terms the location of the front end of the car with reference to the point at which a person was said to be standing on the platform, a witness appears to say that such person was standing by the side of the track as the front end of the car passed, so that the motorman saw or might have seen him, yet, where all the testimony of such witness shows clearly that the person was not standing at such point as the front end passed, but came upon said platform after the front end had passed the point in question, such answer to said former question will not be treated as being any substantial evidence of such fact.

3. ———: ———: **Contributory Negligence.** Deceased went up a stairway to an elevated street railway station platform, thirty feet above the ground, shortly after midnight and sprang upon the rear step of a moving car that was leaving the platform. The motorman had no means of knowing that he would do so. The attempt to board the car was made within ten feet of a guard rail at the edge of the platform which came to within nine inches of the passing car. On the guard rail was a sign warning persons not to board the car while in motion. The gate to the vestibule of the car was closed or nearly so. Deceased got one foot on the step and the other on the vestible floor and was holding on to the gate with one hand to the handrail of the car with the other, his body outside of the gate. In this perilous position he fell or was struck and thrown to the pavement below. *Held*, that he was guilty of contributory negligence as matter of law and could not recover. And that aside from the element of contributory negligence there was no showing of negligence on the part of the motorman on which the case rested.

4. ———: ———: ———: **Boarding a Slowly Moving Car.** While it is not negligence as matter of law for an able bodied man to board a slowly moving car, and that question is usually one of mixed law and fact to be determined by the triers of the facts under instructions of the court, yet, this rule applies only in cases where the act is not attended by unusual and extra-

Digitized by Google

ordinary dangers. It has no application where one boards a moving car upon an elevated platform at midnight within a few feet of the edge where is a guard rail or fence likely to strike and hurl him to the ground.

5. ———: ———: ———: ———: **Proximate Cause of Fall.** The contention that deceased's negligence was not the proximate cause of the injury because it was the sudden jerking of the car that caused him to fall and not his negligence in boarding it cannot be maintained where all the evidence shows that deceased never at any time attained to a safe position upon or in the car but at all times was in an exceedingly perilous situation which was brought about by his boarding the car under such dangerous circumstances.

6. ———: **Relation of Carrier and Passenger: Where Such Status Arises.** Even in the case of a street railway there must be circumstances from which can be implied an offer to be carried on the part of the one desiring to become a passenger, and an acceptance on the part of the carrier before the relationship can be said to exist. If these do not appear the relation of carrier and passenger does not arise. The mere fact that one runs toward and jumps upon a moving street car does not create the relation in the absence of any showing of acceptance on the part of the carrier or of an invitation to board the car.

7. ———: ———: **Duty Owed to One Not a Passenger.** As the deceased did not obtain the status of a passenger, the only duty defendant owed him was to use ordinary care to avoid injuring him after it was discovered, or should have been discovered, that voluntarily and uninvited, he had placed himself in a place of danger.

Appeal from Jackson Circuit Court.—*Hon. Frank G. Johnson,* Judge.

AFFIRMED.

Langsdale & Howell for appellant.

John H. Lucas and Hogsett & Boyle for respondents.

TRIMBLE, J.—Plaintiff, as the widow of Orville Speaks, sues for damages sustained by reason of her husband's death which she charges was caused by de-

Digitized by Google

fendant's negligence. The jury found in favor of one of the defendants and for plaintiff in the sum of $2000 presumably against the other, upon which judgment was rendered against the receivers of both. A motion for new trial was filed which the court sustained on the ground that under the evidence plaintiff was not entitled to recover and that the court erred in not sustaining defendant's demurrer. Plaintiff appealled; and the correctness of the court's ruling is now the question before us.

The husband's fall and death occurred shortly after midnight on Septemer 3, 1911, at the Mulberry Street station on the elevated street railway between Kansas City Mo., and Kansas City, Kansas. The platform and station house is about 30 feet from the ground. It is reached by a stairway leading from the ground to the south side of the station or shelter house, the station platform being on the north side thereof, so that one coming up the stairway must go through the shelter house and through a doorway opening on to the platform and then out upon the platform before reaching the track upon which cars pass and where they stop to let off and take on passengers. At the east end of the platform there was a railing or fence extending from the southeast corner of the station house to the track and approaching so closely and at right angles to it that a passing car comes within eight or nine inches of the end of the fence. From the door of the station to this guardrail or fence nearest the track is 16 feet and 10 inches. On this fence was a sign bearing these words in letters three inches high: "WARNING. DO NOT ATTEMPT TO BOARD CAR WHILE IN MOTION."

The car which deceased attempted to board was 44 feet long and the station patform 49 feet in length. The car was, therefore, almost long enough to occupy the entire length of the platform when fully on it with its front end even with the guardrail or fence at the

Digitized by Google

east end. And this was its proper and usual place to let off and take on passengers at that station. Different cars bound for different points and sections of the city ran over this track and passed this station, so that persons on the patform would not board a car at that point unless it was the particular car they wanted. The car which deceased attempted to board, and from which he fell and was killed, was an east bound car.

Deceased, in company with his two brothers, came up the stairway in single file to the station house. Deceased was in front and went through the station house out on to the platform. His brother, Arthur, was a step or a step-and-a-half behind him and the other brother, William, a similar distance behind Arthur.

At the rear end of the car was a step from which a boarding passenger could reach the rear platform or vestibule and from thence pass on into the car proper. At the edge of the rear platform or vestibule was a gate made of iron net work movable on its joints so that it could be opened by pushing it together to one side or could be closed by stretching it across the opening and fastening it there thus forming a fence or barrier to an entrance upon the platform or vestibule of the car.

It is undisputed that plaintiff's husband got upon the step of the car while it was moving and shortly before the rear vestibule or car platform had passed the fence or guardrail at the east end of the station platform, and that just after the rear vestibule of the car passed this fence or guardrail, he fell thirty feet to the ground below and was instantly killed.

There were three specifications of negligence in the petition. The first two of which charged the conductor of the car with negligence. These, however, could not be relied upon as the testimony of plaintiff's own witnesses did not support either of them and the court very properly instructed the jury that no negligence of the conductor had been shown. The conductor could

Digitized by Google

not be guilty of negligence in ordering the car to start, since all the testimony shows the car was in motion and leaving the station platform before plaintiff's husband attempted to board it by getting upon the rear step of the car.

The third and remaining specification of negligence was against the motorman, charging him with starting the car forward *suddenly* thereby causing plaintiff's husband to lose his balance on the step or runboard of the car and fall to the pavement below. And, since it was admitted that the car was in motion and at least three fourths of the car had passed beyond the east edge of the elevated station platform at the time deceased stepped upon the runboard, the sudden starting of the car complained of was not its initial starting but was a starting up of the car from a slow to a more rapid movement, and made at a time when the rear end of the car was at or near the guardrail or fence at the edge of the station platform, that is, while the car was moving away from and had almost left the station platform, at which time the motorman had a right to presume that the gate to the rear vestibule of said car was closed, according to rule, and that no one would attempt at that perilous place to get upon the car while in motion in violation of the rule of the company and the warning not to do so, conspicuously posted on the guardrail. A sudden acceleration of the speed of the car at that time would not be negligence on the part of the motorman unless he knew or had reason to believe that a passenger had attempted to board, or was in the act of boarding, a car at that point and under those dangerous circumstances, and had not yet had time to get safely inside of the car.

We have examined the evidence offered in plaintiff's behalf carefully to see if there is any substantial evidence tending to show, or from which an inference could be drawn, that the motorman knew or had reason

Digitized by Google

to believe those facts, and we must hold that there is none.

It must be borne in mind that the motorman was on the front or east end of the car wholly unable to see plaintiff's husband at the time he got upon the rear step of the car. Even if plaintiff's husband standing by the track on the station platform as the front end of the car, containing the motorman, passed the station house door so that the motorman saw or might have seen him, yet, as it is conceded that the track was used by cars going in the same direction but bound for different destinations, and as it is further conceded that deceased did not signal the motorman or give him any intimation that he desired to board that particular car, and as plaintiff's witnesses say the car did not stop at the station, therefore the motorman would have a right to proceed and also to presume the rear gate was closed according to rule. It would be requiring superhuman powers of the motorman to charge him with the duty of knowing that deceased would attempt to board the car at such a place and under such dangerous circumstances when every intimation to the motorman was to the contrary. And unless the motorman had reason to believe that deceased would and did board the car and must therefore have a reasonable time to get safely upon it before the speed of the car could be accelerated, it was not negligence for him to resume the ordinary speed of his car usual between stations. But a careful examination of all the testimony offered in behalf of plaintiff convinces us that there is no substantial evidence tending to show, or from which an infenence could be drawn, that the motorman either saw or might have seen deceased on the patform as the motorman passed. It is true, in answer to a request made to the witness Arthur Speaks to indicate on a photograph of the station patform "just about where your brother Orville was standing when the front end of the car passed?" the witness indicated a point about

Digitized by Google

even with the east edge of the station house doorway. And to a lengthy similar question asked of William Speaks, he said Orville was, he judged, about even with the doorway. Even if these answers be accepted at their fullest value, they do not show that the motorman saw or should have seen him. The car, according to their testimony, was moving and did not stop. It was the motorman's duty to look to the front and take in what would reasonably come within the range of his vision on either side of the track, but this did not require him to keep a lookout directly at right angles to the side of the car under the circumstances we have above detailed. But however this may be, the entire evidence of the two brothers shows beyond question that Orville was not standing by the track when the motorman passed the door.

Arthur Speaks testified that the car pulled into the station just as the three brothers reached the top of the stairway; that Orville was in front a step or two or a step-and-a-half ahead of him and he about that distance ahead of his brother. The car was 44 feet long and the station platform 49 feet. The doorway from the station house was slightly nearer to the east end of the station platform than to the west end, it being 16 feet from the doorway to the guardrail at the the east edge of said platform. Arthur Speaks further testified that the car never stopped but was going slow "just barely moving a man could walk slow and catch it." He then testified that as Orville came out of the doorway of the station the *back* end of the car was about even with the door; that as Orville came out of the door he had to go in a north-east direction to catch the car and move fast enough to overtake it. This being true, Orville was not "standing" by the side of the track as the front end of the car passed him. Afterwards, when reminded that he had said the *rear* end of the car was about even with the doorway as his brother came out, he said that he had misunderstood the ques-

Digitized by Google

tion, and that when Orville came out of the doorway the rear end of the car was "a little west of him." Even with this correction this did not show or support an inference that the motorman saw or could have seen Orville, because the point indicated by Arthur as the position of his brother on the platform was slightly east of or even with the east edge of the doorway, and with the car 44 feet long and the rear end only a little west of Orville, it would still put the motorman where he could not have seen or would not be required to see Orville as he came from the doorway. And it is difficult to perceive what it was that the witness failed to understand when he testified that the rear end of the car was about even with the doorway as Orville came out, because on this point his testimony was as follows:

Q. "So his (Orville's) direction from the doorway would be about north-east? A. Yes, sir.

Q. Now in moving towards the car to jump on the steps—I'll say step on the steps, he would have to move in that direction to do that? A. Yes.

Q. The car was moving as he moved along in that northeasterly direction—the car kept moving at the same time? A. Yes.

Q. And he had to move fast enough to overtake the car? A. Yes, sir.

Q. When he came out of the doorway of the station where was the back end of the car? A. Well—

Q. Well, which way was it? About where was it from the door? A. At the time that he came out of the door?

Q. Yes, sir. A. It was about even with him.

Q. The door of the car was about even with the door of the station? A. *Yes, sir. The back end of the car was about even with the door.*"

If the car was going as slowly as Arthur Speaks said it was, and the front end of the car passed Orville while he was standing on the platform at a point even

Digitized by Google

with the east edge of the door, why was it necessary for Orville to go in a northeast direction to catch the car, since he could have stepped on the rear steps as it passed him? The witness said at one place that the back end of the car was five or six feet east of the doorway at the time Orville got upon the step. This made him get on at a point much nearer the guardrail at the east edge of the station platorm and within ten or eleven feet thereof. And yet at another place the witness says that the car started up suddenly "just as fast as a car can when the current is all on" right at the point where, and moment when, Orville got on, and then further on the witness says the car made this sudden increase of speed when the rear end was about two or three feet inside of the guardrail. According to this, therefore, the deceased boarded, or attempted to board, the car at about the place where defendants' witnesses said he did, namely, a few feet inside the guardrail and just before the rear vestibule of the car left the station platform. And to reach the point where he attempted to board the car he went from the doorway in a northeast direction. All of which shows that the motorman could not have seen deceased, and could not have had any reason to believe that he would board the car.

Plaintiff's only other witness as to what took place on the platform was the other brother William. His testimony is that he was just going through the door at the top of the stairs on the opposite side of the station house from the station platform when the rear end of the car was about even with the doorway of the station house; that he was in the station doorway in the act of coming out on the patform when his brother Orville stepped on the rear car step; that Orville did so at a point not over four or five feet from the guardrail and that the car was in motion. This tends to corroborate the version of defendants' witnesses as to what took place on the platform and shows that the

Digitized by Google

motorman could not have seen or anticipated that Orville would attempt to board the car.

Plaintiff's other witness was a negro woman standing on the street below who claims to have seen the man fall; that he was standing "Like as if he was in the door of the car"; that the car gave a jerk and he fell backwards to the street. She said she had noticed how cars increased their speed and felt them jerk as they did so but could not say whether the jerk this car gave was anything unusual or not. She did not testify to anything occurring on the platform.

Under this state of the evidence there was no proof that the motorman was or should have been cognizant of the fact that Orville Speaks had attempted or would attempt to board the car, and hence there was no negligence on the part of the motorman shown. No one says the motorman saw him or that any sign was given to indicate an intention to board the car. And while in answer to a lengthy question in which the front end of the car is placed as passing the doorway, the brothers locate the deceased as standing about even with the doorway, yet their entire testimony shows that he was not standing there when the front end of the car passed, and the answer to each of said two questions cannot be taken as any substantial evidence of that fact. [Oglesby v. Mo. Pacific, 177 Mo. 272, l. c. 296; Brosius v. Sunflower Lead and Zinc Co., 149 Mo. App. 181, l. c. 187.]

The substance and effect of plaintiff's testimony is to confirm the evidence given by defendants' witnesses as to what took place on the platform. Defendants' witnesses consisted of the motorman, the conductor, two persons on the station platform at the time, a young lady and gentleman waiting for a different car, and two men who were passengers on the car. Of the six who testified for the defendant as to what

Digitized by Google

happened, four had no connection with either side and were therefore disinterested. According to the testimony given by defendants' witnesses, the car came into the station and stopped at its regular stopping place. This put the front end of the car about even with the guardrail at the east edge of the station platform, and the rear end of the car in about five feet of the west end of the station platform. The door of the station house opening on the platform was not quite in the middle thereof, that is, it was about eight feet nearer to the east end than to the west end of said platform. Defendants' testimony further showed that at the time the car stopped, there was no one on the platform except the young lady and gentleman at one side thereof who made no effort or move to board the car; that the gate on the rear vestibule was shut and no one attempted to get off the car; that after the car started up, and as the rear end of the car was passing the doorway of the station house, the deceased came out of the doorway and ran after the moving car "catacornered" across the platform and jumped on the rear step; that the conductor called to him not to get on but when he did get on the step, the conductor realizing his dangerous situation hurriedly attempted to open the gate and reached out to help the deceased into the vestibule, but before the conductor could reach him, the deceased's body struck the guardrail a slight blow and he fell to the pavement below; that he fell from the car at a point three or four feet east of or outside the guardrail. Of the foregoing, the motorman testified only that the car stopped at its regular and proper place; that there were only the young lady and her escort the young man on the platform as the car reached it; that he never saw deceased but could have seen him had he been there; and that he did not know that deceased came out and attempted to get on the car. Of course, in determining whether there was any evidence upon which plaintiff could base a recovery, regard must be

Digitized by Google

had only to the evidence in plaintiff's behalf, but the evidence of defendants' witnesses may be considered in order to determine whether it does not help out plaintiff's testimony. In this case it does not, and it is only important in the light of the fact that the effect of plaintiff's evidence is to confirm that of defendant's.

Under the testimony there was no showing of negligence on the part of the motorman. The evidence also fell short of establishing the relation of passenger and carrier. Even in the case of a street railway there must be circumstances from which can be implied an offer to be carried on the part of the one desiring to become a passenger and an acceptance on the part of the carrier. [Mathews v. Metropolitan St. Ry., 156 Mo. App. 715, l. c. 723; Stager v. Railroad, 119 Pa. St. 70; Schepers v. Union Depot Ry. Co., 126 Mo. 665, l. c. 672; Schaefer v. St. Louis & Suburban Ry. Co., 128 Mo. 64.] The mere fact that deceased ran or went toward and jumped or stepped on the moving car did not create the relation of carrier and passenger. [1 Nellis on Street Railways (2 Ed.) Secs. 249 and 258.] There was no evidence anywhere that there was any act indicating an acceptance of deceased as passenger. The petition itself states that the defendant company's rule was that the gate should be kept closed while the cars were in motion and to open the gate only when the cars were still. And it also had a rule forbidding passengers from boarding the car while in motion, and that the warning not to do so was painted in large letters on a sign at the very point where deceased attempted to board the car. It was not necessary to bring home to the deceased actual knowledge of the rule if the rule is so conspicuously posted as to lead to the reasonable inference that notice was given of its existence. [1 Nellis on Street Railways (2 Ed.) Sec. 291.] The brothers also testified that deceased had ridden to and from his work over this line for six years, and he was undoubtedly familiar with the elevated platform

Digitized by Google

and railway. There is, therefore, nothing in the testimony tending to show an invitation on the part of the company to deceased to board the car, and no waiver of the rule against boarding it while in motion, consequently the relation of passenger and carrier did not come into existence. The case is wholly unlike that of Nolan v. Metropolitan St. Ry. Co., 250 Mo. 602, because in that case the person intending to become a passenger signalled to the motorman and the latter replied with a nod and slackened speed, all of which was absent in the case at bar. Nor is it within the rule announced in Spencer v. Transit Co., 111 Mo App. 653, since there was no signal to stop, and paintiff's husband was bound to know that the motorman was not slowing down to stop, since, at the time he got on, even the plaintiff's testimony is to the effect that at least three-fourth's of the car had left the platform, and was beyond the guardrail at the edge. As the deceased did not obtain the status of a passenger, the only duty defendant owed him was to use ordinary care to avoid injuring him after it was discovered or should have been discovered, that voluntarily and uninvited he had placed himself in a place of danger. [Mathews v. Railway, supra.] But no failure in this respect was pleaded or shown.

In addition to all this the deceased was clearly guilty of contributory negligence as matter of law. According to plaintiff's own evidence, it was past midnight. The car was in motion and leaving an elevated station platform and three-fourths of the car was off of it. The gate of the rear vestibule was either closed or two-thirds closed. Arthur Speaks said the gate was not entirely shut and at first said it was two-thirds shut and then afterwards it was two-thirds or one-third open, "or something like that I couldn't say exactly," and that he didn't know when it was opened. The deceased got on the step under these circumstances at the farthest only ten feet from a fence or guardrail running

Digitized by Google

up to the track and on which was a huge sign warning him of the danger. William Speaks says the deceased was not over four or five feet from the guardrail when he got on. If an attempt to board a moving car under these circumstances will not constitute contributory negligence as a matter of law, then it would be difficult to conceive of one where it would. It is true it is not negligence *per se* for an able-bodied man to board a slowly moving car, and the question is one of mixed law and fact to be determined by the triers of the facts under proper instructions from the court. But as said in the Mathews case page 724, "this rule applies only in cases where the act is not attended by unusual and extraordinary dangers." In Joyce v. Railroad, 219 Mo. l. c. 374, under circumstances almost identical with these at bar, the Supreme Court held that if a person undertook to board a car after it started to leave an elevated platform and was struck and thrown down by a guardrail at the edge thereof, he could not recover.

But plaintiff says his attempt to get upon the car did not cause him to fall; that only the sudden starting up of the car caused that, and consequently his contributory negligence, if any, had nothing to do with his fall. The trouble with this contention is that according to all the evidence deceased never was safely on the car. Even plaintiff's evidence shows he only had one foot on the step and the other on the vestibule floor and was outside the partly closed vestibule gate holding to it with one hand and to the rear handhold of the car with the other. He was therefore in a position of great peril, and instead of his contributory negligence in getting on the car having nothing to do with his fall, it had everything to do with it, and was the proximate cause thereof.

Viewing the case from every possible angle and in the light of the testimony most favorable to plaintiff, and giving it the benefit of every intendment and infer-

Digitized by Google

ence which it will reasonably support, it clearly appears that the plaintiff had no case and the trial court was correct in holding that the demurrer to the evidence should have been sustained. The judgment is, therefore, affirmed. All concur.

F. J. CUSHING, Appellant, v. W. A. PETRIE et al, Respondents.

Kansas City Court of Appeals, May 4, 1914.

1. **TAX BILLS: Paving: Choice of Material: Continuance.** Where the charter of a city of the second class empowered a board of public works to formulate and propose to the city council an ordinance for paving a street, the charter requiring the proposal to be continued by the board for fifteen days before transmitting to the council in which time the majority of the property owners might make choice of the material for paving and which choice should be put into the ordinance, the board, had no power to propose such ordinance, nor the council to pass it until the full fifteen days had expired. And where the board did propose an ordinance without allowing that time for choice of material, a tax bill issued for such paving is void.

2. **TAX BILLS: Board of Public Works: Ordinance.** Where a majority of property owners on a street petitioned for paving it, naming the material; and where the charter of the city provided that the board of public works should hear objections to the petition and if overruled, continue the matter for 15 days so that a majority of the property owners might select the material for the paving; it was held, that refiling the original petition by the board without direction from the petitioners and then, before the expiration of the 15 days of continuance, proposing a paving ordinance to the city council was unauthorized and tax bills issued for such paving were void.

Appeal from Buchanan Circuit Court.—*Hon. Chas. H. Mayer,* Judge.

AFFIRMED.

Digitized by Google

Spencer & Landis for appellant.

W. A. Petrie pro se and *John S. Boyer* for respondents.

ELLISON, P. J.—Plaintiff's action is to enforce the lien of a special tax bill issued by the city of St. Joseph, a city of the second class. The judgment in the trial court was against the validity of the bill.

The bill was issued for street paving as authorized by the laws of 1903, page 60. It is provided in section 6, of that act that the board of public works of its own motion, or on petition of "a majority in front feet of the resident real estate property owners", may propose an ordinance for the paving and shall advertise for five days in the official paper notice to all persons interested, of the time and place when and where the board will hear objections to the proposed ordinance. "And if the board shall overrule such objections, then the matter shall be continued for fifteen days, and within that time the owners of a majority of front feet, . . . shall have the right to select, in writing, any material they desire to be used in making said improvement, and such selection shall be embraced in the ordinance. . . ."

It seems that a majority in front feet of property owners filed with the board on the 19th of December, 1907 a petition for the paving and, though not required by the statute, named the material they desired. It appears that no action was taken on this, but that on the following 28th of May, 1908 the board of its own motion, ordered a proposed ordinance, with plans and specifications for the paving, and directed that five days published notice for objections be given, and this was done. Then, on the 4th of June thereafter, the board met and overruled the objections made and continued the matter for fifteen days for the selection of the paving material by the property owners as re-

Digitized by Google

quired by the statute. Then, on the same day (June 4th) the board received from some one (it not appearing who) the petition for the paving which had been presented in the first instance, in December, 1907, and on June 8th ordered it refiled. Thereupon, on the same day, (June 8th) the board made a finding that within fifteen days granted, within which property owners might select, in writing, the material with which said improvement should be made had been filed by a majority in front feet of the resident real estate owners. The trial court found that these defendants had no knowledge of the refiling the petition and that there was no evidence that any petitioner ever requested it to be refiled, and that there was no evidence of the selection of material by the property owners except as here stated.

From the foregoing it appears that after expiration of the five days notice to property owners to appear and make objections, the board overruled such objections and continued the matter for fifteen days as required by the statute in which "time the owners of a majority of front feet abutting on the highway, or public place sought to be improved and owned by residents of said city, shall have the right to select, in writing, any material they may desire . . . and such selection only shall be embraced in the ordinance". But instead of waiting for the expiration of the fifteen days time given to the property owners, the board on the very day of making the order of continuance, found that the selection of material had been made by the refiling of the petition as above stated. Passing by any question as to this refiling having been made by the board itself without request from the petitioners, the board evidently thought as the petitioners for the paving (though at a time not contemplated by law) had named the material six months before that constituted a selection of the material. The view of the board necessarily assumed

Digitized by Google

that the majority of property owners originally signing a petition to have paving done was a fixed body and remained a majority afterwards when the time, designated by law, arrived in which to choose the material for such paving; and thus have cut out a right to take part in the selection of material of all that body of property owners who did not sign the original petition. It is manifest that those in the minority when the petition was signed have a right at the lawful time, viz, within fifteen days after objections are overruled, to mingle with, and exchange views with, the signers as to the kind of material to be used. Opinions may be formed, changed or modified at this time. To adopt the view of the board would be, in effect, to say, as a matter of law, that no one on the original petition in which he expresses a choice not then legally proper to make, could make a selection at the time the statute directs it shall be made.

We have examined the cases of Webb v. Strobach, 143 Mo. App. 459 and other cases cited by plaintiff and find them inapplicable on the facts and conclusions of law drawn therefrom.

But in addition to the foregoing views, we have the ruling of the Supreme Court in Sedalia v. Montgomery, 227 Mo. 1, 22, 29-31, that the board and the city council had no power to act since they violated the provisions of the statute necessary to confer jurisdiction. No jurisdiction was conferred upon the board of public works to propose an ordinance to the council, nor upon the council to pass it until the property owners had had the statutory period in which to make a choice of the material.

The judgment is affirmed. All concur.

Digitized by Google

CARRIE BEST, Respondent, v. CITY OF ST. JOSEPH, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **NEGLIGENCE: Municipal Corporations: Damages: Sidewalks: Snow and Ice.** Where plaintiff's petition charged that a certain walk was dangerous and unsafe by reason of rough, knotty, uneven and slippery ridges of ice which had formed and remained for so long a time as to give notice to the city of the unsafe condition, and that she was thereby caused to fall and receive an injury, her recovery will not be defeated because her testimony shows, in addition to the facts supporting the above charge, that the walk itself was rough and uneven having been constructed of blocks of cement laid loosely upon the ground with large irregular cracks between them. If the accumulation of snow and ice formed an obstruction on the walk rendering it dangerous and not reasonably safe and was the direct cause of the fall, then the city cannot escape liability merely by showing that the dangerous condition was increased by the faulty construction of the walk.

2. **PLEADING: Grounds of Negligence.** A petition which charges one specific act of negligence will not support a recovery upon another and different ground.

3. **EVIDENCE: Whether Defect was in a City Street.** Where the entire record shows that the case was tried on both sides upon the theory that the place of the accident was on a publicly travelled street of the city and no contention was made that it was not, the case will not be reversed because there is no evidence specifically and expressly saying it was a street of the city.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk,* Judge.

AFFIRMED.

F. B. Fulkerson, L. E. Thompson and *Herman Hess* for appellant.

Mytton & Parkinson for respondent.

Digitized by Google

TRIMBLE, J.—Plaintiff sued the city of St. Joseph for injuries received from a fall upon a sidewalk in said city. Her petition charged that at the point in question rough, knotty, uneven and slippery ridges of ice had formed and remained for a long time prior to the accident and had rendered the sidewalk dangerous and unsafe.

There was evidence tending to fully support every issue raised by the petition, and the jury found a verdict for her in the sum of $1000.

Plaintiff's evidence also showed that the walk itself was rough and uneven having been constructed of blocks of cement laid loosely upon the ground with large and irregular cracks between them. It is defendant's contention that it was the defectively constructed sidewalk that caused the injury and not the accumulation of snow and ice in ridges or hummocks; and that the petition having charged one specification of negligence, plaintiff ought not to be allowed to recover upon another and different ground.

There is no doubt that a plaintiff should not be allowed to recover for an act of negligence not included in the petition. But in our opinion this was not done in this case. Plaintiff did not plead one ground and recover upon another. She charged that the sidewalk was rendered dangerous and unsafe by reason of the ice forming in lumps and ridges and the proof showed, or tended to show, that such was the case and that it had remained thus for a sufficient length of time to have enabled the city to know of it in the exercise of ordinary care. Her instructions to the jury predicated her right to recover solely upon the finding of such facts by the jury.

It was not necessary for plaintiff's instruction No. 1 (complained of by defendant) to embrace the defense that the defective condition of the sidewalk itself, and not the snow and ice, caused the injury because the instruction by its very terms necessarily included it.

Digitized by Google

The instruction told the jury that before plaintiff was entitled to recover the jury must believe that the ridges, knots and lumps of snow and ice, if any, constituted an obstruction, rendered the walk dangerous and unsafe and was the direct and immediate cause of the alleged fall. Before a verdict for plaintiff could be returned the jury were required to find that there was an accumulation of snow and ice forming an obstruction on the sidewalk rendering it dangerous and that the obstruction caused the fall. It was, therefore, not only unnecessary, but might have been misleading to tell the jury that they must also find that the defective condition of the walk, as constructed, did not cause her to fall. For if the obstruction of snow and ice was the proximate cause of the fall the city could not escape liability by showing that the dangerous condition of the walk was increased by its faulty construction. In other instructions the jury were told that the mere fact that plaintiff fell and was injured at the point in question did not render defendant liable or entitle plaintiff to recover; also that the burden was on plaintiff to show that the walk was in a dangerous or defective condition by reason of snow and ice having been permitted to accumulate and remain thereon in uneven ridges or masses.

The court did not err in refusing defendant's instruction lettered "A" since it was fully covered by defendant's given instructions numbered 5 and 9.

It is true there is no witness who testifies affirmatively that the point in question on Charles street was in the city of St. Joseph, Missouri. And while we cannot consider the alleged admission of the attorneys in the opening statement that the place was inside the city, (since the opening statement was not preserved in the record), yet it is plainly apparent from the questions and answers, the instructions asked by and given for both sides, and from the manner in which the case was tried, that the fact that the walk was in

Digitized by Google

the city and was a city sidewalk was not a disputed issue, but was assumed by all parties. We are, therefore, not justified in reversing and remanding the case upon this ground. There being no error in the record, the judgment is affirmed. All concur.

LAURA B. MINOR, Respondent, v. O. D. WOODWARD and WILLIS WOOD, Appellants.

Kansas City Court of Appeals, May 4, 1914.

1. **PRINCIPAL AND SURETY: Bonds: Liability of Obligors.** The defendants came into possession of a publishing company which had a lease on a building, the ground floor of which had been placed on a level three feet above the street grade to suit the peculiar needs of the publishing company. The owner of the building had been given a lien on a printing press to secure the performance of the terms of the lease. Defendants desired to sell the press, and, in order to obtain a release of the lien, gave a bond to the owner of the building to pay the cost (to the extent of $2500) of restoring the ground floor to the street level should the lease be terminated or no new tenant be secured at the end thereof who would use the building with the floor thus raised. At the end of the term no new tenant could be secured who would use the building with the floor thus raised above the street level. Plaintiff reduced the front third of the floor to the street level, the second third was lowered a part of the way and the rear one third was left as it was. The expense of doing this was much less than if she had lowered the entire floor to the full street level, but was greatly in excess of the amount of the bond. She then sued defendants on the bond. *Held*, that the bond was an original undertaking on the part of defendants, and they are not mere sureties for the publishing company; that their liability thereon is not *strictissimi juris*; and that plaintiff's failure to lower the entire floor did not release the obligors.

2. ———: ———: ———. A surety may contract as a principal and by doing so will renounce the right of setting up a defense arising out of the relation of principal and surety.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas*, Judge.

Digitized by Google

AFFIRMED.

C. A. Loomis for appellants.

Scarritt, Scarritt, Jones & Miller for respondent.

TRIMBLE J.—Suit upon a bond in the sum of $2500 executed by defendants to plaintiff on May 3, 1906. In the circuit court plaintiff obtained judgment for the full amount of said bond, and defendants appealed.

The bond and the reason for defendants giving it originated in this wise: In November, 1904, the plaintiff, Mrs. Laura B. Minor, was preparing to erect a three-story business building, with basement thereunder, at the south-east corner of Tenth and McGee streets in Kansas City, Missouri. The building was to face McGee street (which ran north and south) and was to run back east along the south side of Tenth street. The front entrance and first floor were to be on a level with the grade of McGee street. A corporation, known as the I. W. Dumm Publishing Company and certain individuals connected therewith, Mr. Dumm, Mr. Clark and Mr. Horn, were engaged at that time in publishing a newspaper, and desired to rent suitable quarters for the company, and, therefore, proposed to Mrs. Minor that she lease the building, proposed to be erected, to it. The nature of its business, however, did not require the ground floor and entrance to be on the grade of McGee street and did require that said ground floor should be three feet above said grade, as that would give more height and light and air to the basement. Mrs. Minor did not care to erect a building with its ground floor so much above the grade of the principal street on which it was located, thereby making the building suitable for a particular business only, unless she was sure of a long time rental well secured, or would be reimbursed for the

Digitized by Google

expense necessary in changing the ground floor and front entrance back to the grade of McGee street. The publishing company and the men named as connected therewith agreed to these terms, and thereupon on November 12, 1904, a lease was executed by Mrs. Minor, as first party, to the I. W. Dumm Publishing Company, and said individuals, as second parties, for a term beginning April 1, 1905, and ending March 31, 1910. She agreed therein to erect and complete the building as soon as practicable and to raise the ground floor and change the plans of the outside walls and front so that said floor would be three feet above the normal grade. Permission was given to sublet said building. And the second parties, agreed that "if this lease is not renewed at the end of the first term hereof as hereinbefore provided, or in case this lease is terminated or possession of the leased premises taken by the party of the first part or her representatives for any cause, except total destruction by fire, prior to April 1, 1910, then second parties will pay the first party or her legal representatives the reasonable cost of placing the first floor of said building upon the normal or street grade thereof, including the cost of changing the outside walls and front of said building, so as to make the same complete and workmanlike and to conform to the change in the elevation of the floor; provided, however, that if the first party prior to or at the time of the surrender of the possession of said premises by second parties, shall lease said premises to a third party who will not require the elevation of said first floor to be lowered to the normal or street grade at an annual rental satisfactory to first party, then the first party will waive the claim for making such changes; provided, that in no event shall the cost of making such changes to be charged against second parties exceed the estimate now made by said architects, to-wit, $2500."

Digitized by Google

The lease further provided that, "the party of the first part shall have until the termination of this lease a lien upon all the erections, improvements, machinery and fixtures of second parties that may during the term of this lease be placed on or in said land and building, to secure the payment of the rent and the performance of the stipulation and agreement herein contained."

The building was duly erected and the Publishing Company entered and took possession under its lease and the printing presses and other machinery and personal property placed therein by it became subject to Mrs. Minor's lien for the rent and for the performance of the other terms of the lease.

Just how long the Publishing Company continued therein and to pay rent is not known. Plaintiff attempted to prove that it continued in business only about a year and a half and that then Mr. Woodward, one of the defendants, came into control of the business and began paying the rent on the building. Defendants objected to this as being immaterial, and their objection was sustained. Plaintiff then offered to show that, at the time the bond herein sued on was executed by the defendants to plaintiff, Mr. Woodward was in charge of the businss, paid the rent on the building and that the bond in suit was accepted at his request. Defendants objected to this and were again sustained.

Notwithstanding these adverse rulings of the court, there is enough in the record to show that Dumm, the president of the company and Horn left the country and that in some way, either through financial embarrassment or otherwise, the Publishing Company fell into the hands of Mr. Woodward and that thereafter he, Woodward, paid the rent. The defendants are in no position to assert or complain that the evidence is not definite enough to show a formal legal transfer, sufficient to pass title, of the assets of

Digitized by Google

the Publishing Company, or of the lease to the defendants and their associates, because they, by objecting to such showing, succeeded in getting the trial court to refuse it admission to the record. But, with the explicit evidence on these points excluded, there is still enough in the record, coupled with the bond itself, from which the conclusion can be reasonably drawn that the defendants were giving the bond for themselves and in their own interest and not as mere sureties for the Publishing Company.

At any rate on May 3, 1903, just 1 year, 5 months and 19 days after the execution of the lease the bond in question was executed. At this time Mrs. Minor held the lease on the building and a lien on an "Optimus" printing press therein for the performance of all the terms of the lease. The defendants were desirous of selling this printing press and, to get it released from Mrs. Minor's lien, they agreed to give her the bond in question. The terms of the bond are as follows:

"We, the undersigned, O. D. Woodward and Willis Wood, of Kansas City, Missouri, do hereby acknowledge ourselves indebted unto Laura B. Minor in the sum of Two Thousand Five Hundred Dollars ($2500), for the payment of which well and truly to be made, we hereby bind ourselves, our successors, executors, administrators and assigns."

The condition of this bond is such that whereas . . . (Here follows a statement that the I. W. Dumm Publishing Company leased the property on November 12, 1904) . . . and

Whereas, it is provided in that lease . . . (Here follows a statement that the front and outside walls were to be changed and the floor raised three feet above the street grade) . . . and

Whereas, it is further provided in said lease that "if this lease is not renewed at the end of the first term

Digitized by Google

thereof as hereinbefore provided, or in case this lease is terminated or possession of the leased premises taken by the party of the first part or her representatives for any cause except total destruction by fire, prior to April 1, 1910, then second parties will pay first party, or her legal representatives, the reasonable cost of placing the first floor of said building upon the normal or street grade thereof, including the cost of changing the outside walls and front of said building so as to make the same complete and workmanlike and to conform to the change in the elevation of the floor; and,

Whereas, said I. W. Dumm Publishing Company in order to secure the performance of the said provisions of the said lease did mortgage or convey unto said Laura B. Minor one "Optimus" printing press, manufactured for it by the Barnhardt Bros. & Spindler Co., of Chicago, and which was placed in the building on the property, aforesaid; and,

Whereas, the first parties desire to have said mortgage released so that said press may be sold and conveyed free from the lien of said mortgage; and,

Whereas, said Laura B. Minor has consented to release and satisfy said mortgage in consideration of this bond;

Now, therefore, if the said first party shall faithfully perform and keep the provisions of said lease in respect to the matters hereinbefore set forth and will save the said Laura B. Minor entirely harmless by reason of any breach of such conditions of said lease then this undertaking shall be null and void; otherwise to remain in full force and effect.

In witness whereof, we have hereunto set our hands and seals this 3rd day of May, 1906.

O. D. Woodward, (Seal)
Willis Wood, (Seal).

The Publishing Company is not a party to the bond. And it nowhere says it is given as surety for

Digitized by Google

said Company. Upon the face of the bond the defendants contract as principals, and the bond is given, not for the benefit or accommodation of another but for defendants' own benefit and advantage because they want to sell the printing press free from Mrs. Minor's lien. The undertaking and agreement is not to pay in case the lessees named in the lease do not pay, but the condition of the bond is that if they, defendants, shall faithfully perform and keep the provisions of said lease then the undertaking is to be null and void. The provisions of said lease were 1st, to pay rent, 2nd, to pay to the extent of $2500 for changing the ground floor front and walls if the lease was not renewed and plaintiff could not rent the building with the floor above the street level. The defendants performed the first mentioned provision by paying the rent. At the end of the term provided in the lease, March 31, 1910, Mrs. Minor could not lease the building with the floor as it was. Mr. Woodward, at the time he paid the last month's rent demanded a release from further obligation but this was refused, and demand was made that the expense of changing the floor be paid according to the terms of the bond.

Mrs. Minor, having taken possession of the building at the end of the leasehold term, was unable to find a tenant who would rent the building with the floor thus raised, and after demanding of defendants that they bear the expense of changing it in accordance with their bond, she had the floor changed.

Owing to the great increase in the price of labor and materials between 1904 and 1910 it was found in 1910 that the cost of lowering the whole first floor to the McGee street level, would greatly exceed the amount estimated therefor in 1904. The plaintiff, therefore, did not lower the entire floor from the front on McGee street back to the end of the building. To have done so would have cost a very large sum much in excess of what she did do. Instead of lowering the

Digitized by Google

entire floor at this large expense, she lowered only one third of the store to the McGee street level, and she lowered the next one third only to the grade of Tenth street at that part, and the rear one third was left as it was. The evidence clearly showed that this cost *much less than to lower the whole floor,* but the reasonable cost of changing the floor, even in this less expensive or more economical way, cost $3829.24 *or nearly* $1500 *in excess of the bond given by defendants.* That is, the expense of changing the floor in the way plaintiff did change it cost more than the bond in question, but was still much cheaper than if she had lowered the whole floor instead of only one third all of the way and another third only part of the way.

The defendants offered no testimony. The jury found a verdict for plaintiff for the full amount of the bond, $2500, and judgment was rendered thereon.

It is the contention of defendants that they are in the position of mere sureties for the Publishing Company, and that their liability on said bond is, therefore, *strictissimi juris,* of the strictest right or law. Their position is that they are not liable for any amount thereon unless plaintiff put the whole of the first floor down to the McGee street grade, notwithstanding the fact that the reasonable cost of lowering it as she did was less than the cost of lowering the whole and was more than the amount of the bond.

The language of the bond itself shows that it is an original undertaking of defendants to pay Mrs. Minor the reasonable cost of placing the first floor of said building upon the street grade, including the cost of changing the outside walls and front of said building to conform to said change, if the lease is not renewed and provided she cannot rent it with the floor above grade, the amount to be paid by them, however, not to exceed $2500. "Where a surety binds himself in terms as a principal in the obligation which he signs, he will be held as principal, and will be entitled to none of the

Digitized by Google

rights of a surety. There is no rule of law which prohibits a surety from waiving the right which belongs to him as such. Such a waiver has nothing in itself offensive to the policy of the law. The express terms of the obligation in such case exclude the idea of suretyship, and the creditor has a right to avail himself of the contract his vigilance has obtained." [1 Brandt on Suretyship Sec. 51.] "A surety may contract as "a principal" and by so doing will renounce the right of setting up a defense arising out of the relation of principal and surety." [Picot v. Signiago, 22 Mo. 587; McMillan v. Parkell, 64 Mo. 286; Sprigg v. Bank, 10 Pet (U. S.) 255; Derry Bank v. Baldwin, 41 N. H. 434; Menaugh v. Chandler, 89 Ind. 94.] In the above case of Picot v. Signiago, 22 Mo. l. c. 593, our Supreme Court said: "The defendant might have become a mere surety to the contract, but when he renounced that character and expressly bound himself as principal, with what face can he afterwards insist that he is only a surety?" Parties having signed a bond are estopped to deny the facts recited therein. [Brown v. Ligon, 92 Fed. 851; 1 Brandt on Suretyship Sec. 52; Monteith v. Commonwealth, 15 Grattan (Va.) 172.] The mere fact that defendants bound themselves to pay if the lease was not renewed and Mrs. Minor could not lease the building with the floor as it was, did not make defendants sureties, but was an original undertaking on their part that if the specified contingencies arose they would pay her the reasonable cost of changing the floor, walls and front to the extent of $2500. [Academy of Music Co. v. Davidson, 85 Wis. 129.] And on the strength of this undertaking on their part, Mrs. Minor released her mortgage on the printing press and allowed defendants to sell it.

The bond does not require, as a condition precedent to her right to be paid the reasonable cost of changing the floor, that Mrs. Minor must first do the remodelling. The lease says: "If this lease is not

Digitized by Google

renewed at the end of the first term thereof. . . . then second parties will pay first party or her legal representatives the reasonable cost of placing the first floor of said building upon the normal or street grade thereof, including the cost of changing the outside walls, etc." The bond quotes this clause and says that as Mrs. Minor holds a lien on the printing press to secure performance of the terms of the lease and as they want to get rid of this mortgage and sell the press and Mrs. Minor is willing to release "in consideration of this bond" therfore if they save Mrs. Minor entirely harmless from loss by reason of any breach of such terms, then the undertaking was to be null. Suppose at the end of the lease no tenant could be found who would take the floor as it was and that Mrs. Minor had no funds with which to change it, would defendants' obligation under the terms of the bond cease? Unless the terms of the bond make the doing of the work a condition precedent to a right or cause of action thereon, the obligee in the bond is not required to do it before bringing suit. [Farley v. Moran, 31 Pac. (Cal.) 158.] In Fuller Co. v. Doyle, 87 Fed. 687, a contractor Doyle agreed to erect a building for plaintiff and gave bond which provided that if the contractor did not fulfill the contract, plaintiff could enter upon the premises and cause the work to be completed. The contractor abandoned the work and plaintiff finished it. The court held that plaintiff's cause of action accrued when the contractor abandoned the job, and held further that the variations made by the plaintiff from the original plans did not invalidate the bond or release the surety because its liability became fixed when the contractor abandoned the contract and the mere fact that plaintiff, in doing the work contracted to be done, did some other things for which no claim was made, could not change the matter. In the case at bar, while the cost of remodeling the building was $10,036, yet the cost of lowering the

Digitized by Google

two thirds of the floor that was lowered (the first one-third being lowered the full three feet to the level of McGee street and the next one third not quite so low) was kept separate from the other expense and was $3829.24 which was still more than the bond. So that it is not seen wherein defendants have any right to complain because Mrs. Minor did not go to still further expense and lower the remaining third of the floor. She was compelled to lower the front third down the full three feet to the level of McGee street and the next one-third a part of that distance and to conform the front and walls to such change all of which cost less than to lower the entire floor. The liability of defendants became fixed when the lease was not renewed and no new tenant was found. Mrs. Minor had a right to sue then for the reasonable cost of lowering the floor. She did lower two thirds of it and in doing so spent more money than the bond was given for but less than it would have cost to lower the entire floor. What right have defendants to complain if she did not lower the remaining one third? Their liability was fixed before she lowered any part of it and the limit of the amount they obligated themselves to pay was passed in doing the part she did. In Spear v. Stacy, 26 Vt. 61, the defendant gave plaintiff a bond to complete a building but failed to finish it. The plaintiff brought suit, and it appeared that some of the work plaintiff did in finishing the building was not done until after the institution of the suit. The court held that the finishing of the building was not a condition precedent to plaintiff's recovery but that there had been a breach of the bond when defendant failed to complete the building and that plaintiff's cause of action accrued then. The same doctrine is held in Barnett v. Franklin College, 37 N. E. 427.

The petition is not drawn upon the theory that the doing of the work by plaintiff in lowering the floor is a condition precedent to her right to recover upon the

Digitized by Google

bond. Neither does the allegation that she lowered the floor and expended thereon, in doing so, the sum of $3600 which was the reasonable cost of doing the work, constitute a pleading that she lowered the *whole* floor so as to make proof of lowering two thirds thereof a variance from the pleading. It will not do so unless we are to consider the pleading with as much or more strictness than an indictment under the old common law procedure. The allegation that she had done the work was a proper, though perhaps not a necessary, allegation since evidence that the work was done and of its cost would be an excellent showing as to the extent and reasonableness of such cost. There was nothing in the petition limiting the plaintiff to a right to recover upon showing, as a condition precedent, that she had lowered the whole floor rather than a part of it.

The plaintiff is not suing for work of an entirely different character from that specified in the bond. She is suing for the very work covered by it. She is entitled to recover. And the judgment should be affirmed. It is so ordered. *Ellison, P. J.*, concurs. *Johnson, J.*, dissents.

STATE OF MISSOURI, Respondent, v. G. W. JOHNSON, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **LOCAL OPTION: Intoxicating Liquors.** The defendant was convicted for a violation of the Local Option Law and from that conviction prosecutes this appeal. He was the proprietor of a restaurant and had procured a license from the Federal Authorities to sell intoxicating liquors and was convicted of having sold three pints of whiskey. *Held*, that the demurrer to the evidence was properly overruled.

Digitized by Google

2. **ELECTIONS: Notice: Statute.** It is not necessary under Secs. 7238 and 7240, R. S. 1909, that the notice of an election shall be addressed to the persons qualified to vote at the election.

3. **EVIDENCE: Hearsay.** Where one testifies over the objection of the defendant concerning a conversation that took place with a prosecuting witness out of the hearing of the defendant, it is error, because it is not part of the *res gestae*, but was *res inter alios*.

Appeal from Sullivan Circuit Court.—*Hon. Fred Lamb*, Judge.

REVERSED AND REMANDED.

R. G. Nelson and *J. W. Clapp* for appellant.

J. M. Wattenbarger for respondent.

JOHNSON, J.—Defendant appealed from a conviction in the circuit court of Sullivan county for a violation of the Local Option Law. A motion to dismiss the appeal was filed by respondent and overruled but the point still is urged and we are cited to State v. Dempsey, 168 Mo. App. 298, as sustaining it. In that case the appeal did not operate as a stay of proceedings and we held that section 5309, Revised Statutes 1909, applied, and imposed on the appellant the duty of filing the transcript in proper time. In this case, as shown by the record, the appeal operated as a stay of proceedings and under section 5398, of the statutes, the duty of making out and filing the transcript devolved on the clerk of the circuit court. The motion is found to relate to a negligent performance of that duty for which the appellant should not be held accountable and was properly overruled.

Counsel for defendant assail the Local Option Law on the ground that it is unconstitutional. A similar attack moved us to transfer the case of State v. Campbell to the Supreme Court but that court refused to take jurisdiction and retransferred the case, saying the

Digitized by Google

constitutionality of the Local Option Law no longer may be considered an open question. (214 Mo. 362.) Following that decision we hold the point is without merit and cannot be considered as affecting our jurisdiction over this case.

The record discloses that the Local Option Law had been legally adopted in Sullivan county long before the date of the alleged offense.

Objection is offered to the published notice of the election on the ground of its failure to state that it was addressed to the qualified voters of the county. The title of the notice was "Notice of Local Option Election," and beginning with the recital that it was a notice of special election "to be held under the provisions of Article 3, of Chapter 22, of the Revised Statutes of Missouri, 1899, commonly known as the Local Option Law, to determine whether or not spiritous and intoxicating liquors, including wine and beer, shall be sold within the limits of Sullivan county, in the State of Missouri," proceeded to give the record history of the proceedings and ended with the order of the court for holding an election. Defendant argues that a notice to be effective must be directed to the person, persons or class of persons intended to be notified (29 Cyc. 1118; Watson v. Walker, 23 N. H. 471) and that the statutes (7238 and 7240, Revised Statutes 1909) contemplate that the notice shall be addressed to the persons qualified to vote at the election. The statutes do not say so in express terms nor do we think such restricted meaning should be read into them by implication. The general public, i. e. all classes of citizens including qualified voters are interested in such elections and the law intends that the notice shall be for the information of all and not for that of any particular class. The objection to the sufficiency of the notice is not well grounded.

Defendant was the proprietor of a restaurant and had procured a license from the Federal authorities to

Digitized by Google

sell intoxicating liquors. The prosecuting witness stated that he and a companion had breakfast in the restaurant on the morning in question and that before leaving the place he purchased three pints of whiskey from defendant for which he paid $2.25. Defendant denied making the sale and gave testimony which, if believed, would lead to the conclusion that the accusation against him was prompted by hatred or malice. The testimony of the prosecuting witness was not self-contradictory nor inherently weak and standing alone was of sufficient probative force to overcome the presumption of innocence. Neither the trial judge nor the jury were bound to believe defendant, either as to his denial of the sale or his counter attack on the credibility of the accuser. The court did not err in overruling the demurrer to the evidence.

The companion of the prosecuting witness introduced by defendant testified that he did not see or know of any sale of liquor being made at the time. On cross-examination he was allowed to state, over the objection of defendant, that the prosecuting witness, out of the hearing of defendant, said he had bought or was going to buy some whiskey from defendant. Such evidence was pure hearsay and should have been excluded. Whether such conversaton occurred in or outside the restaurant, or before or after the alleged sale, is immaterial. Not occurring in the presence or hearing of the defendant, it was not a part of the *res gestae* (State v. Pollard, 174 Mo. 616) but was *res inter alios* (Commonwealth v. Harwood, 4 Gray, 41) and its admission was highly prejudicial to defendant.

Further we think the court erred in not sustaining the objection of defendant to certain improper remarks in the argument of the prosecuting attorney to the jury, but since the judgment must be reversed for the error just discussed, we do not deem it necessary to do more than admonish the prosecuting attorney to

Digitized by Google

refrain from repeating such remarks at a subsequent trial.

The judgment is reversed and the cause remanded. All concur.

EMMETT M. LEWIS and EMMETT M. LEWIS, Admr. PETERIE DRUG CO., Appellant, v. GEORGE E. SMITH, G. D. WALKER, J. H. KOENING and F. W. AUSTIN, Respondents.

Kansas City Court of Appeals, May 4, 1914.

1. **EQUITY: Principal and Surety: Satisfaction of Judgment.** When a creditor knows that one occupies the relation of surety to the principal debtor and notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken and which he otherwise would have taken, he is discharged.

2. ———: ———: **Worthless Check.** The mere acceptance by the creditor of a worthless check given by the principal obligor will not discharge the sureties when it is not shown and does not appear that the securities were injured.

Appeal from Miller Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED.

W. S. Stillwell, W. S. Pope and *W. C. Irwin* for appellant.

L. N. Musser and *H. L. Donnelly* for respondents.

JOHNSON, J.—In 1908, the defendant, George E. Smith, prosecuted an action in replevin in the circuit court of Miller county against Emmett M. Lewis as

Digitized by Google

administrator of a partnership estate. Judgment was rendered against Smith and the sureties on his replevin bond, the present defendants Walker, Koenig and Austin. Lewis elected to take the value of the property which was assessed at $450 and the judgment was rendered accordingly against Smith and his sureties. On October 8, 1908, Smith gave Lewis a check on a bank in St. Louis for $463, the amount of the judgment and interest. The check was signed "St. Louis Charcoal Company by George E. Smith, President." Smith was the president of that company and had authority to draw checks in the name of the company but had no authority to use its funds to pay his individual debts. Plaintiff, who is a lawyer, accepted the check and deposited it for collection in a bank in Miller county and in due time it was presented to the St. Louis Bank and paid. The proceeds came to the hands of Lewis who accounted for them as administrator and distributed them under the orders of the probate court. Lewis also satisfied the judgment against Smith and his sureties and the sureties were informed that the judgment had been paid by Smith, their principal. At the time they signed the replevin bond and when judgment was rendered against them Smith was solvent and the evidence shows the sureties were in position to protect themselves against loss but relying upon the reported payment of the judgment they considered themselves absolved from liability and made no effort to protect themselves. Afterward Smith became insolvent and retired from the presidency of the Charcoal Company. His successor discovered that he had paid his individual debt out of the funds of the corporation and caused a suit to be brought by the corporation against Lewis to recover the proceeds of the check. This was ten months after Lewis had cashed the check and long after he had distributed its proceeds among the creditors of the partnership estate which was insolvent. The Charcoal Company lost the suit in the circuit court but on appeal

Digitized by Google

we reversed the judgment and remanded the cause on the ground that since the check was drawn on the account of the corporation by the president for the payment of his individual debt "the face of it carried notice of its irregular and illegal character and if used by the creditor he runs the risk of being called upon to restore it." [Charcoal Company v. Lewis, 154 Mo. App. 548.] After remanding the cause judgment was rendered against Lewis in the circuit court and he was thereby compelled to restore the proceeds of the check to the Charcoal Company. He brought this action in the nature of a bill in equity to set aside the satisfaction of the judgment. After hearing the evidence the court rendered judgment for defendants and plaintiff appealed.

The real issue in the case is whether or not the acceptance of the check operated as a release of the sureties. Plaintiff testified that when he accepted the check he knew of its infirmity and that he did not release the judgment until after he received the proceeds and became satisfied that the corporation would make no point of the misuse of its funds. We think plaintiff voluntarily assumed all the risk of being called upon to restore the money to the corporation and discharged the sureties whose character, as such, had not been altered by the fact that judgment had been rendered against them. [Rice v. Morton, 19 Mo. 264; 23 Cyc. 1477.]

We held in Hogan v. Kaiser, 113 Mo. App. 711, that the mere acceptance by the creditor of a worthless check given by the principal obligor will not discharge the sureties when it is not shown and does not appear that the sureties were injured. [Bank v. Lillard, 55 Mo. App. 675; Bank v. Danckmeyer, 70 Mo. App. 168.] But this is not that kind of case. Here the creditor with notice of the infirmity in the check accepted it and received and used its proceeds, knowing that at some future time he might be called upon to refund them. He

Digitized by Google

did this without the knowledge or consent of the sureties and informed them by releasing the judgment that he had been fully paid and by such acts lulled them into a feeling of security. The rule is well settled that "when a creditor who knows that one occupies the relation of surety to the principal debtor notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken and which he otherwise would have taken, he is discharged." [Bank v. Lillard, 55 Mo. App. 675; English v. Seibert, 49 Mo. App. 563; White v. Smith, 174 Mo. l. c. 206; Lakenan v. Trust Co., 147 Mo. App. l. c. 58.] The present case falls under this rule and the circuit court committed no error in holding that the sureties were discharged.

Affirmed. All concur.

M. G. LOVE, Appellant, v. F. H. SCOTT, Respondent.

Kansas City Court of Appeals, May 4, 1914.

REPLEVIN: Sales. The owner of notes secured by liens on personal property agreed with the mortgagor to release the liens, if the latter would sell the property at public auction and pay the notes out of the proceeds of such sale. The property was accordingly sold for more than the amount due on the notes and a part of the proceeds was paid by the clerk of the sale to the owner of the notes, who applied a portion of said amount to the payment of an unsecured open account, which he had against the mortgagor. The latter asserted that the proceeds of the sale in excess of the amount due on the notes belonged to and should be paid to him. This action followed. *Held*, that the special interest of the owner of notes in the property securing the notes was satisfied by the sale and he must look to the trustee for the fund he elected to accept as security in lieu of his liens.

Digitized by Google

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb,* Judge.

AFFIRMED.

John D. Taylor for appellant.

J. A. Collet for respondent.

JOHNSON, J.—This suit was begun in the circuit court of Chariton county, November 27, 1912, to replevin two horses, one mare, one farm wagon, one disc harrow, one corn planter and two sets of harness, of the total value of $500. Verdict and judgment were for defendant and plaintiff appealed.

Plaintiff, who lived in Illinois, owned a farm of 160 acres in Chariton county, Missouri, near Mendon and early in the year 1912, entered into an agreement with defendant who also lived in Illinois, to remove to the farm and occupy it during the ensuing crop year as his tenant. A written lease was entered into which fixed the rental for the year at $864, and defendant executed and delivered to plaintiff his promissory note for that sum to become due and payable without interest on February 20, 1913. Defendant owned some live stock and farm implements but had no money and plaintiff advanced him money for removal expenses, to purchase needed implements and tools and to live on until harvest. The sum of all such advances was about $1900, and plaintiff received a promissory note from defendant for a portion thereof, amounting to $1025. This note was dated April 4, 1912, and matured February 20, 1913. It bore interest from date and was secured by a chattel mortgage on all of defendant's personal property. The remainder of the advances was left in the form of an open account.

About October 1, 1912, and before the maturity of either of the described notes defendant became dis-

Digitized by Google

satisfied and resolved to give up the farm and return to Illinois. His total indebtedness to plaintiff was $2740.22, consisting of the rent note of $864, which was secured by a landlord's lien on the crops, the note of $1025 secured by the chattel mortgage covering all of defendant's personal property on the farm, and the unsecured open account for the remainder. Also he owed a debt of $329.35 to a Mr. Stewart for some property he purchased for use on the farm and some other small debts to merchants. In furtherance of his purpose to terminate the tenancy defendant entered into negotiations with plaintiff which culminated in an agreement to sell at public sale all the property covered by the landlord and chattel mortgage liens. Both notes were to be treated as due for the purposes of the sale and the distribution of the proceeds and plaintiff agreed to release all the property from his liens which were to attach to the proceeds of the sale. The property bought of Stewart was to be sold at the same time and its proceeds applied, first, to the payment of his claim. A clerk of the sale was agreed upon and invested with the duty of receiving the proceeds and distributing them in accordance with the agreement of the parties. There is no dispute in the evidence over any of these facts but there is a sharp and vital controversy over the terms of the agreement relating to the share of the proceeds plaintiff was to receive. He contends that first they were to be applied to the payment of his entire demand, including the open account and that defendant was to have the remainder. On the other hand, the evidence of defendant discloses an agreement that the proceeds were to take the place of the property and be subject only to the discharge of the liens which were merely transferred from the property to its proceeds and that the unsecured open account was to remain as it was. In other words, the clerk of the sale, who was made a trustee of the pro-

Digitized by Google

ceeds was to apply them, first, to the discharge of the liens amounting to about $1900, and then pay the remainder to defendant.

The evidence of defendant on that issue is substantial—indeed, is so strong that if we were sitting as triers of fact we would say, as did the jury, that he had the better of the controversy.

The sale was made and the property covered by the liens was sold under the announcement of plaintiff that he released it from his liens. Exclusive of the Stewart debt which was paid out of the proceeds of the property defendant had purchased of him, the proceeds realized from the property and paid to the clerk amounted to about $2300, a sum greater than was required to discharge both liens, but not enough to pay the open account held by plaintiff. Shortly after the sale defendant gave plaintiff a written order on the clerk for the proceeds but on reflection concluded he had acted unwisely and countermanded the order, but not until after plaintiff had obtained $1000 on it. In addition to this payment plaintiff received $444 from the sale, making a total of $1444, which if applied on the two lien notes would have reduced the amount due on them to $498.56. Instead of doing this he applied these payments, first to the discharge of the open account and then brought suit against the clerk of the sale to recover all of the fund remaining in his hands. Also he began the present action against defendant to recover property covered by the liens but bought at the sale by friends of defendant for defendant's benefit. Plaintiff states it was agreed before the sale that there was to be no "by-bidding" but this is denied by defendant.

While the sheriff was executing the writ of replevin there was a tempestuous meeting of the parties convoked by the attorney for defendant for the purpose of ascertaining the amount due on the lien debts in order that defendant might tender payment of such

Digitized by Google

amount and costs out of the fund in the hands of the clerk and thus end the litigation. On learning the amount defendant offered payment of it and the accrued costs out of the proceeds held by the clerk and repeated the offer in the answer he subsequently filed. There is much discussion in the briefs over the question of the sufficiency of these offers to constitute a tender within the legal meaning of that term but in the view we have of the whole case it would be fruitless to enter into that discussion and for present purposes we shall omit from consideration all of the evidence bearing on that subject.

Objection is urged by counsel for plaintiff against the admission of testimony relating to the conversation the parties had at their meeting following the bringing of this suit. The objection is based on the idea that the meeting was the result of an effort to compromise and settle the differences between the parties but as we understand the evidence, neither party was actuated by such peaceful motive. Thinking it important for defendant to make a tender of the amount of the lien notes still unpaid, his attorney called the meeting for that sole purpose and while at the interview there was much acrimonious discussion of the respective positions of the parties, there was no suggestion of an amicable adjustment of their differences. The law is very zealous in the encouragement of peaceful settlements of disputes and to that end will not allow proof of unsuccessful attempts at compromises but where, as in the present instance, the parties meet not to compromise but to give battle, the rule does not apply, for obvious reasons. Defendant thought to secure a strategical advantage by a tender of the amount due on the notes and his adversary met him with the assertion of a claim to a lien on the proceeds of the sale for the open account and to a lien on the replevined property under the chattel mortgage. In the course of the wordy contest plaintiff, so defend-

Digitized by Google

ant states, made certain admissions of evidentiary value to defendant about the agreement for the sale. The court did not err in admitting testimony of such admissions since they were not made in an effort at compromise but in the course of the controversy.

At the time of the sale the open account was not a lien on the property and neither of the notes secured by liens thereon was due. There had been no breach of the conditions of the chattel mortgage nor of the landlord's lien. Plaintiff had no right to the possession of the property until condition broken, nor could defendant have sold it unencumbered of the liens without the consent of plaintiff. Thus situated the parties agreed to an immediate sale of the property and in consideration of receiving immediate payment of debts that would not mature for four months plaintiff agreed to release the property from his liens and to look to the proceeds of the sale for his security. His interest in the property was measured by his liens and unless he procured the consent of defendant to include the open account in his right to a lien on the proceeds, we think he had no interest in or right of possession to the replevined property, since the proceeds of the sale were more than sufficient to discharge the two notes in full. If the clerk of the sale, who became trustee of the proceeds, has funds that should be applied to the payment of these notes, plaintiff has his remedy against him. When the clerk became possessed of enough funds to pay the notes in full plaintiff's interest in the remaining property ended and it is immaterial to him that defendant had that property bought in for his own benefit. After the notes were paid the remaining property was defendant's, completely subject to his *jus disponendi*. Of course he had no right to dispose of it in a way to defraud his creditors, including plaintiff who was still a creditor to the extent of his open account, but he had a right to take it free of encumbrances, unless, as we have

Digitized by Google

said, the agreement for the sale included the open account as a demand secured by a lien on the proceeds.

The only issue in the case was whether the agreement made the open account a lien demand. Plaintiff says it did, defendant that it did not. The evidence of each is substantial and since the agreement was not reduced to writing the issue became one of fact for the jury to determine. The jury, under appropriate instructions, have solved that issue in favor of defendant and with the fact established that the open account was to remain unsecured and that only existing liens were to attach to the proceeds we hold that plaintiff's special interest in the property was satisfied and that he must look to the trustee for the fund he elected to accept as security in lieu of his liens on the crops and other personal property of defendant. The agreement, as stated by defendant, did not lessen the extent of the liens. Plaintiff surrendered no part of his security and was to receive the benefit of a speedy discharge of his secured claims. He would have realized that benefit if he had refrained from his unjust attempt to force the payment of his unsecured demand in violation of his agreement.

Defendant was not required to make a tender of the amount remaining unpaid on the two notes, out of the fund in the hands of the clerk. He had no control over that fund and, despite his wishes, or anything he might do, it was the duty of the clerk, the trustee, to dispose of the fund in accordance with the trust agreement. To defeat plaintiff's claim to the property in suit it was enough for defendant to show that the mortgage lien had been shifted by agreement to the fund and that the fund was sufficient to discharge that lien.

The judgment is affirmed. All concur.

Digitized by Google

CLAUDE ROBERTS and BESSIE ROBERTS, Respondents, v. BENJ. W. TRUNK, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **NEGLIGENCE: Automobiles: Frightened Horse.** The plaintiffs, who are husband and wife, sued to recover damages for the death of their infant child, which was thrown out of the buggy in which they were riding, when the horse became frightened at the defendant's automobile. The defendant's car made a sudden appearance at the crest of the hill on a public road, running at a rapid speed in a cloud of dust, and the horse though accustomed to automobiles, became uncontrollable and the plaintiffs were thrown out of the buggy and the child was killed. *Held*, that it is the duty of the autoist to use the highest degree of care that a very careful person would use under like circumstances to prevent injury or death to persons on or traveling over such public roads.

2. **INSTRUCTIONS: Penal Statute.** Where an instruction includes Sec. 5425, R. S. 1909, which relates to the penal feature of the statute, it is erroneous as applied to a private conveyance.

Appeal from Buchanan Circuit Court.—*Hon. Chas. H. Mayer*, Judge.

REVERSED AND REMANDED.

O. C. Mosman and *Vinton Pike* for appellant.

Thompson & Griswold for respondents.

JOHNSON, J.—Plaintiffs who are husband and wife sued to recover damages in the sum of ten thousand dollars for the death of their infant child which they allege was caused by the negligence of defendant in the operation of his automobile. The answer is a general denial. The jury returned a verdict for plaintiffs, assessing their damages at $3000 and on the overruling of his motion for a new trial, defendant appealed.

Digitized by Google

The death of the child, who was five years old, was caused by the fright of a horse attached to a buggy in which she was riding with her parents. The horse was being driven westward on a public road in Buchanan county and became frightened at an automobile coming at high speed from the opposite direction. The horse, though spirited, was accustomed to motor vehicles, but the sudden appearance of the car on the crest of a hill and its rapid approach in a dense cloud of dust, caused the animal first to exhibit keen anxiety and then uncontrollable terror. Finally it whirled around, upset the buggy, kicked itself loose and ran away. The child received injuries from which she died the following day. The car was occupied by defendant, who was driving, and several companions. It is conceded that the fright of the animal was apparent and was observed by defendant when the car was at the top of the hill. Defendant and his companions say the horse was plunging and showing other signs of being uncontrollable at their first view of him and that his fright must have had some other cause, since it began before he could see the automobile. Further they state that defendant immediately stopped his car at a distance, afterward ascertained by measurement, of 335 feet from the place of disaster. On the other hand, the evidence of plaintiff tends to show that the sudden apparition of the car and the enveloping cloud which advanced swiftly with it frightened the horse and that the continued approach of the terrifying spectre at unabated speed caused him to become unmanageable.

For present purposes we must accept the evidence of plaintiffs which not only accuses defendant of negligence but of a most reckless indifference to the rights of the occupants of the buggy whose lives were put in the greatest jeopardy by a cause within his control.

Digitized by Google

The first point to receive our attention is defendant's criticism of the first instruction given at the request of plaintiff which, it must be confessed, is entirely too long. As observed by counsel for defendant, it was not necessary to incorporate in the instruction the entire legislative code on the subject of the various duties of autoists to others rightfully using the public highways, nor to include conceded facts in the hypothesis on which a verdict for plaintiffs was directed. Such faults have a tendency to obscure the real issues and to divert the thoughts of the jury into erroneous or, at least, unprofitable channels. But in the present instance we do not find the defects noted rise to the dignity of prejudicial error. What we may call the charge in the instruction directed a verdict for plaintiffs only upon the hypothesis that the injury of the child was due to negligence of defendant (first) in driving the car at unreasonably high speed, (second) in failing to keep a vigilant watch, and (third) in failing to stop or check speed after the peril of the occupants of the buggy became apparent.

There was evidence tending to show that the injury was caused by one or more of such acts of negligence. If any one of them was the proximate cause of the injury, defendant would be liable for the resultant damages under the provisions of chapter 83, Revised Statutes 1909, which enjoin upon autoists the duties of running at reasonable speed (sec. 8519), of keeping "a vigilant watch for all vehicles . . . drawn by animals," (sec. 8517) and of stopping and taking reasonable precautions to avoid injuring the occupants of such vehicles on the appearance of danger to them. The term "vigilant watch" includes not only the task of looking ahead for animal-drawn vehicles but while approaching them to keep a sharp lookout for exhibitions by such animals of fright or uneasiness which if disregarded might endanger the lives or safety of human beings.

Digitized by Google

The statutory duty of the autoist is "to use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury or death to persons on or traveling over such public roads." [Sec. 8523.]

We do not believe the jury could have been misled by the unnecessary verbosity of the instruction into a misconception of the legal duties of defendant towards the child, and, as we have shown, there was no inaccuracy or vagueness in the application of the legal rules to the ultimate evidentiary facts which were clearly and succinctly stated.

The instruction on the measure of damages given at the request of plaintiffs in as follows: "The jury are instructed that if you find a verdict for the plaintiffs herein, you will assess their damages at such sum as you may believe from the evidence they have sustained on account of the death of their child, in an amount not less than two thousand dollars nor more than ten thousand dollars, in the discretion of the jury, and in determining the amount, you may take into consideration the amount, if any, that you may find from the evidence plaintiffs have sustained on account of the loss of the earnings of their infant child prior to her reaching the age of eighteen years, less the expense of her support and maintenance during said time, and you may also take into consideration the facts constituting negligence, if any, on the part of the defendant, causing the death."

It will be observed that this instruction embraces the penal features of the remedy afforded by section 5425 of the statutes which provide that in cases where the death of a person is caused by negligence, unskillfulness or criminal intent of the operator of a public conveyance (including automobiles) the owner or operator of such public conveyance "shall forfeit and pay as a penalty, for every such person . . . the sum of not less than two thousand dollars and not ex-

Digitized by Google

ceeding ten thousand dollars, in the discretion of the jury," etc.

The history and interpretation of this remedial provision which first appeared in an amendment of the statute enacted in 1905, have received exhaustive attention in a number of recent decisions of the Supreme Court and Courts of Appeals. There has been much discussion and difference of opinion over the question of whether the remedy is penal, compensatory or both penal and compensatory, but that question has been definitely settled in the decision of the Supreme Court in Boyd v. Railroad, 249 Mo. 110, where it is held that a recovery under section 5425 is penal up to the sum of $2000, but that the extent to which a plaintiff may recover, if at all, in excess of that sum up to $10,000, is remedial and compensatory and the jury and court where a sum in excess of $2000 is demanded, in exercising the wise and just discretion which the statute authorizes, should consider evidence of the age, condition of health and earning capacity of the deceased, and the consequent loss to the plaintiff, together with the circumstances attending the killing, overruling so far as conflicting, Young v. Railroad, 227 Mo. 307 and Boyd v. Railroad, 236 Mo. 54.]

Section 5425 by its terms applies only to public conveyances and could have no application to the case in hand where the automobile was being used as a private conveyance but for a provision in section 8523 which, referring to private motor vehicles, makes the owner or operator of such vehicle "liable in damages to a person . . . injured by the failure of the owner, operator, or person in control of an automobile, to use such degree of care and in case of the death of the injured party, then damages for such injury or death may be recovered as provided in section 5425," etc.

The absence from this statute of any reference to a penalty similar to that prescribed in section 5425,

Digitized by Google

led the St. Louis Court of Appeals in the case of Nicholas v. Kelley, 159 Mo. App. 20, to the conclusion that only compensatory damages and not a penalty are recoverable in actions falling within the purview of section 8523. We are impressed with the reasoning supporting the concluson and refer to that decision for a full and complete expression of our own views on the subject. Plaintiffs are entitled only to compensatory damages and in fixing a minimum limit to the recoverable damages and in directing the jury to "take into consideration the facts constituting negligence, if any," the instruction erroneously included the penal features of section 5425, which as we have shown, have no application to an action for negligence in the operation of a private conveyance. The error was prejudicial, since we cannot know whether, or to what extent, the verdict which exceeded the minimum assessment allowed by the instruction is responsive to the punitory direction to take into consideration the facts constituting negligence. We must assume the jury were influenced by that charge and that the damages assessed in their verdict were not entirely compensatory as they should have been. Since the case must be remanded and may be retried we admonish plaintiffs to avoid repeating the faults we have noted in the first instruction.

The judgment is reversed and the cause remanded.

All concur.

Digitized by Google

HENRY LOWENSTEIN and HENRY LOWENSTEIN, Administrator of the Estate of JULIUS LOWENSTEIN, deceased, Respondents, v. OLD COLONY LIFE INSURANCE COMPANY, a corporation, Appellant.

Kansas City Court of Appeals, May 4, 1914.

LIFE INSURANCE: Mis-statement of Age in Application. Where a life insurance company issues a policy to one who inadvertently made a wrongful statement in the application as to his age, the application being afterwards corrected and the additional premium paid, and the assets and liabilities transferred to another company, the latter company is bound by the acts of its predecessor and the rights of plaintiff cannot be restricted to the amount of insurance the premium paid would have purchased at the correct age of the assured.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

A. F. Rector and *A. R. Hoy* for appellant.

Duggins & Duggins for respondents.

JOHNSON, J.—This is an action on a policy of life insurance. The principal defense is the alleged misrepresentation of the age of the insured in his application and defendant confesses liability for the amount of insurance the agreed premium would have secured on the life of a person of the real age of the assured. Plaintiff denies the insurance was procured by misrepresentation and demands the face of the policy with interest and the statutory penalty. A jury was waived and after hearing the evidence the court rendered judgment for plaintiff in accordance with the prayer of his petition except that no penalty was allowed. Defendant appealed.

Digitized by Google

No declarations of law were asked or given and the judgment must be regarded as a final adjudication in favor of plaintiff of every controverted issue of fact.

The material facts of the case, stated in chronological order, are as follows: In 1896, Julius Lowenstein, a resident of Marshall, applied in writing to the Royal Tribe of Joseph for a certificate of insurance and stated in his application that he was born in August, 1838, and was fifty-eight years old. The application was accepted and a policy or certificate for $1000 was issued and delivered to him as a person of the represented age. The application was made a part of the contract which is claimed by defendant to have been governed by the laws relating to fraternal beneficiary societies but there is no proof in the record that it was a contract of that character (Gruwell v. Knights, 126 Mo. App. 496 and cases cited), and we shall regard it as an ordinary life insurance policy. Lowenstein paid premiums or dues which were assessed at a rate based on his represented age until 1903, when the Royal Tribe of Joseph reinsured its risks in the Cosmopolitan Life Insurance Association, a life insurance corporation of Illinois. Lowenstein was notified that the reinsurer "herewith assumes the benefit certificate No. 5407, issued by the Royal Tribe of Joseph of Sedalia, Missouri, on the life of Julius Lowenstein, and contracts to carry out the provisions thereof in accordance with the terms, provided the insurer complies with and fulfills the obligations assumed thereunder."

Pursuant to this notice Lowenstein exchanged his certificate for a policy issued and delivered to him by the reinsurer which recited that it was issued upon his original application to the Royal Tribe of Joseph and the premiums were based on his present age as computed from the date of his birth stated therein. Lowenstein accepted this new policy and paid premiums thereon at the stipulated rate until 1906, when the Association discovered in some way, not disclosed, that his age

Digitized by Google

had been misrepresented and that he was born in August, 1831, instead of 1838. Under date of November 5, 1906, the Association wrote him a letter submitting alternative propositions, the second being "that you pay the difference in the rate of assessment between what you are paying and what you should pay at your correct age since becoming a member of the Royal Tribe of Joseph, up to the present time, and continue to pay the correct rate of assessment at your correct age in the future." Lowenstein replied saying, "I positively did not misrepresent my age at the time of joining the Royal Tribe of Joseph. I told the organizer that as near as I could tell at the time, my age; as I came to this country very young, had no way of telling of my years at that time. I wish, therefore, to accept your second proposition of your letter of the 5th inst."

The Association replied November 20th giving the grand total of the deficiency in the past premiums as $87.30 and requesting remittance of that amount by return mail. The letter closed with the statement, "Beginning with the November, this month's assessment, your correct rate is $2.90 (per month) instead of $2.30 as you have been paying. This matter must be attended to by return mail."

Lowenstein promptly remitted the amount demanded ($87.30) and thereafter continued to pay monthly premiums or assessments until September, 1909, when the Cosmopolitan Association reinsured its risks in the defendant company, another insurance corporation chartered by the State of Illinois. By the terms of the reinsurance contract the Association sold and delivered to defendant "all of its assets of every character and description wheresoever located, including all its applications, inspection reports, books of accounts, records, files and indexes which in any manner bear upon, evidence or explain the risks taken or refused in the course of its business from the date of its organization," and defendant assumed all of the liabil-

Digitized by Google

ities of the Association and agreed "to deliver to each of the policy or certificate holders of the said Association . . . the company's 'Convertible Term Policy,' which said policy shall provide . . . a two-year term policy with the right of conversion by the holder during said period of two years to any other form of policy the company issues . . . at the rate of premium required therefor at the attained age," etc. Such "Convertible Term Policy" was to be delivered to each holder of an Association policy who, on or before November 14, 1909, would deposit his policy with defendant and consent to take such "two-year term policy" in exchange. Defendant bound itself "that upon the receipt of any such policy or certilcate from any member of said Association, which said policy or certificate being in good standing at the date of its delivery to the company, it will issue forthwith to the member so depositing said policy or certificate a receipt, acknowledging receipt of payment of premium to the date to which said premium has been paid." The substituted policies were to be issued without medical examination and regardless of the condition of health of the assured but with the right to a lien on the term policy "for ten per cent of each annual premium commuted on the annual premium basis to be paid by said member on said Convertible Term Policy, to be treated by the said company as an Impairment Lien on account of no examination being required to issue said exchange policy."

The contract contained the further provision that "All policies to be issued by the company under the provisions of this contract in substitution of policies or certificates issued by the Association up to the date of ratification of this contract shall be based on the original application to the Association, which application shall bear the same relation to the policy to be issued by the company in substitution, as herein pro-

Digitized by Google

vided, as if such application had originally been made to the company instead of said Association."

Following the signing of this contract the two Companies advised Lowenstein by letters and notices of the agreement of defendant to reinsure the risks of the Association and urged him to send in his policy for exchange. They did not tell him that defendant proposed to issue a short term policy nor that such policy would be issued on the faith of his original application. Their representation was that defendant assumed the risk the policy he carried imposed on the Association. Lowenstein responded by sending his policy to defendant and under date of October 14, 1909, defendant issued to him the following receipt, denominated on its face a "Certificate of Assumption:"

"Received by the Old Colony Life Insurance Company, Certificate of Policy No. 21155 of the Cosmopolitan Life Insurance Association of Freeport, Illinois. The Old Colony Life Insurance Company acknowledges itself bound to the holder of said certificate or policy under the provisions of the contract between said company and said Cosmopolitan Life Insurance Association, ratified September 9, 1909, by the members of said Association in legal meeting assembled. Said company will promptly deliver to the holder of said certificate or policy its policy provided for in contract above referred to between said company and said Association, which shall be paid up to Oct. 25, 1909, being the end of the period for which payment has been made to the Association."

On October 25th of the same year defendant delivered to Lowenstein a short term, nonparticipating policy by the terms of which it agreed to pay plaintiff (his son) immediately upon receipt of proofs of death the sum of $1000. The caption contained the words and figures "Premium $111.09. Age 71." This policy does not refer to the original application nor contain any other reference to the age of the assured

Digitized by Google

than the following: "If the age of the assured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age, or the premium may be adjusted and credit given to the insured or to the company according to the company's published rate at the date of issue."

Further the policy provides that it "is not entitled to participate in the profits or divisible surplus of the company" and that "this policy may be converted upon written request of insured and without medical examination at any time within two years from its date by exchange, for any form of policy issued by the company at the date of exchange except term policies, at the company's published premium rate for the age attained."

The assured died at Marshall December 11, 1909, less than two months after the receipt of this policy. Plaintiff made proofs of loss in which he stated that his father was born August 15, 1829, in Tuchel, Prussia Poland. In answer to the question, "State authority for answer to last question (family record, certificate of birth or otherwise)," he answered, "No family records—facts as told by deceased in his lifetime to claimant."

Plaintiff claims that the policy was issued and the annual premium of $111.09 was charged on the erroneous supposition that Lowenstein was seventy-one years old at that time, when, in truth, as shown by the proofs of loss, his age was eighty years; that this mistake was induced by the false representation of the original application to the Royal Tribe of Joseph that the applicant was born in 1838; that under the terms of the policy, which must be treated as an Illinois contract, the assured must be considered as having misstated his age to defendant and plaintiff is entitled to recover only the amount of insurance the annual premiums of $111.09 would have purchased at the correct age. It is shown that the annual premium on such

Digitized by Google

policy for a person eighty years old was $211.37, and that the premium of $111.09 would have purchased insurance in the sum of $528.80. Further it is shown that Lowenstein owed $90.99 on the first premium and deducting this from $528.80, and deducting also $11.10, the amount of the impairment lien, left a remainder of $426,71, which is the sum defendant would pay in full discharge of its liability under the policy.

Pursuant to the reinsurance contract the Cosmopolitan Association turned over to defendant all its applications, books, records, and correspondence, including such documents as it had formerly received from the Royal Tribe of Joseph. At the time it issued the policy in suit it had in its possession not only the original application of Lowenstein, but also the records and correspondence of the Association showing the discovery of the misstatement of age in the original application and the readjustment of the contract of insurance to conform to the conceded fact that the birth of Lowenstein was in August, 1831, instead of August, 1838. In explanation of the mistake in the policy the officers of defendant testified that they looked only to the original application and did not examine the correspondence and records relating to the correction of the misstatement until after the proofs of loss informed them of the discrepancy between the application and the policy issued by defendant. Further it appears from the records of the Association in the possession of defendant that for some strange reason the Association had followed its sharp and successful correspondence with Lowenstein which resulted in his tacit confession that he was born in 1831 and his payment of the amount of the claimed deficiency in past premiums, by continuing to levy and receive payment of monthly assessments on the old basis instead of the new. The oversight of the Association (for it cannot be regarded as anything else) did not mislead defendant, since its officers did not inspect the files and rec-

Digitized by Google

ords which would have disclosed the readjustment of the insurance, but, as stated, contented themselves with an inspection of nothing but the original application. Plaintiff and one of his brothers testified their father came to the United States from his birthplace in Europe when he was very young; that there was no record or family history of his age and that even he did not know the year of his birth. As we understand the evidence the statements of plaintiff in the proofs of loss relating to the age of his father were a mere guess or conclusion founded on vague and unreliable information. Plaintiff is not conclusively bound by such statements. The fact of the real age of his father is an issue legally raised by the pleadings and the trial court, sitting as a jury, well may have believed from the evidence that the readjustment of the contract of insurance forced by the peremptory demand of the Association was based on an agreement or understanding between it and the assured relating to the date of his birth which came as near the true fact as the inaccurate and unreliable data would permit. Whether Lowenstein fraudulently or innocently had misstated his age in his application to the Royal Tribe of Joseph, the Association, after acquiring full knowledge of the misstatement offered to continue the relationship of insurer and insured upon condition that he would make adequate restitution and would consent to treat the contract from the beginning and in the future as having imposed upon him the obligation he would have been required to assume had his age been stated accurately in the first place. This offer being accepted and performed, the effect of such acceptance and performance was to create a new contract of insurance which, so far as the subject of age was concerned, was wholly independent of, and unrelated to, the original application. Had Lowenstein died immediately after the readjustment agreement became effective the Association would have been in no

Digitized by Google

position to interpose a defense based on the misstatement in the original application which the parties, in effect, had agreed should be *functus officio*—should be eliminated as an integral part of the insurance contract. The fact that for some undisclosed reason the Association did not levy and collect subsequent assessments in accordance with the terms of the new agreement did not alter the relationship it established which continued to the date of the acceptance by Lowenstein of the policy issued to him by defendant, pursuant to the last reinsurance contract.

The risk the Association was under on the date it entered into the reinsurance contract was to pay the face of the policy on the death of the assured without any deduction on account of the misstatement in the application as to the age of the applicant. Under the terms of the reinsurance contract defendant, in consideration of succeeding to the assets and business of the Association, assumed its risks and so notified Lowenstein and offered to substitute a policy of its own issue for the one he had, without requiring a medical examination or a new application. In every possible way it assured him that it was merely stepping into the shoes of the Association. Neither its letters and notices to him nor the short term, nonparticipating policy it induced him to take contained any intimation that it proposed to revive his old application to the Royal Tribe of Joseph and make it a part of the new contract of insurance. The policy did indicate in its caption that an error had been committed by defendant in the statement of the age of the assured but there is a material difference between an error induced by the false representation of the insured and one resulting from negligence or mistake of the insurer.

Neither the laws of Illinois which defendant contends control the interpretation of the policy, nor of this State, give the insurer the right to have his liability reduced on account of his own mistakes. Sec.

Digitized by Google

208u, Hurd's Rev. Stat. Ill. 1911, provides that "if the age of the insured has been misstated the amount payable under the policy shall be such as the premium would have purchased at the correct age," but this obviously refers to representations of the insured and in a subsequent clause of the same section policies of temporary insurance and nonparticipating policies (such as the present) are expressly exempted from this provision. [Sec. 5c, 208u.]

The statutes of Illinois do not aid the position of defendant nor is there any stipulation in the policy which will justify the contention that defendant may take advantage of its own mistake in the age of the assured. The provision in the policy that "if the age of the assured has been misstated the amount paid herein shall be the same as the premium would have purchased at the correct age," is quoted literally from the Illinois statute and refers, as does the statute, to misrepresentations of the assured in procuring a policy but there were no such misrepresentations made to defendant.

Defendant chose, both in its contract of reinsurance and in its proposals to Lowenstein, not to call for a new application but to step into the position of the passing Association and to shoulder its burdens. The old application was dead beyond recall. The records and files in the possession of defendant disclosed the cause and manner of its taking off, and defendant had but to look at what was before it to know that the insurance was being carried on a substituted agreement which had wholly disregarded that application.

We do not wish to be understood as intimating that defendant would not be entitled to a correction of a mistake which would give it a lien on the policy for the amount of the difference between the premium it charged and the premium it should have charged. We express no opinion on that subject since it is foreign to the issues raised by the pleadings. What

Digitized by Google

we are holding is that the mistake made by defendant was not the result of any misrepresentation of Lowenstein and, therefore, that neither the provisions of the laws of Illinois nor those of the policy itself give support to the position that the recovery of plaintiff should be restricted to the amount of insurance the premium paid would have purchased at the correct age of the assured.

The judgment is affirmed. All concur.

EDWIN DAVIS, Respondent, v. T. J. CREAMER, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **CONTRACTS:** Sale of Lands. Where one enters into a contract to buy a tract of land for a certain definite sum, and one payment is made on the signing of the contract, he is entitled to recover the amount so paid when the seller refuses to comply with the contract after demand has been made on him.

2. **INSTRUCTIONS:** Interest. When an instruction asks for interest from the date of demand, and judgment is so given, it is erroneous, where the plaintiff has failed to ask for interest in his petition.

Appeal from Maries Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED (*conditionally*).

Pope & Terrill for appellant.

Leslie B. Hutchinson and *John A. Watson* for respondent.

JOHNSON, J.—This suit was begun in a justice court to recover the sum of $100 plaintiff alleges he

Digitized by Google

paid on the purchase price of a farm defendant sold him and afterward refused to convey. A trial in the circuit court where the cause was taken by appeal resulted in a verdict and judgment for plaintiff and defendant appealed.

In September, 1912, the parties entered into an oral contract by the terms of which defendant sold a farm in Maries county to plaintiff for $6000 and agreed to execute and deliver a deed conveying the fee simple title and to give possession of the farm to plaintiff on or before the first day of the following January. Plaintiff agreed to pay $100 of the purchase price at once and the remainder of $5900 when the deed was delivered and possession of the land given. The initial payment was made as agreed but before the date fixed for the consummation of the sale defendant informed plaintiff of his purpose to abandon the contract unless plaintiff would agree to a substantial alteration of its terms. The parties do not agree about the substance of the proposed modification. Defendant states he demanded a further payment on the purchase price while plaintiff insists that he demanded a larger price for the farm. Plaintiff refused to alter the contract, demanded the return of the down payment and on the refusal of that demand, began this suit.

Defendant is in error in the view that the action did not fall within the jurisdiction of a justice court because it involved title to real estate. The same point was before us in Adams v. Ellis, 86 Mo. App. 343. We held the suit was "to recover money paid on a contract which defendant is charged with abandoning. The fact that it was necessary to prove that defendant had sold the land to another did not involve a question of title. It was merely a matter of evidence in proof of a fact." The action is for money had and received and the proof of defendant discloses a lack of even a semblance of an excuse for keeping the

Digitized by Google

money which was paid to him pursuant to the oral contract. He admits he refused to carry out the terms of that contract and it is too plain for argument that he could not repudiate the contract and still be entitled to retain its fruits. The demurrer to the evidence was properly overruled. No error is found in the instructions except in one particular, i. e., no claim of interest was made in the petition but the instructions authorized the assessment of interest from the date of demand and interest was allowed in the verdict and judgment. This was error. Where interest is not asked in the petition none should be assessed—not even from the date of the institution of the suit. [Van Riper v. Morton, 61 Mo. App. 440; Shockley v. Fischer, 21 Mo. App. 551.] Counsel for plaintiff confess the error and offer in their brief to file a remittitur of the amount of the interest. This may be done (Shockley v. Fischer, supra). On condition that a remittitur of the interest be filed within ten days the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

All concur.

GERTRUDE SNYDER, Appellant, v. URIAH T. TOLER, Respondent.

Kansas City Court of Appeals, May 4, 1914.

1. **WILLS: Trusts: Precatory: Construction.** The plaintiff sued to recover under a will on the ground that it created a precatory trust. The property was bequeathed by will to her stepmother, and it was sold to the defendant, who was a brother of her deceased father. The bequest under which the precatory trust is claimed to have existed is as follows: I give to my beloved wife, Ann C. Toler, all my property, real, personal and mixed, absolutely, knowing she will deal properly with my grandchild, Gertrude Snyder, and my son, Uriah Toler." *Held*, that these words of recommendation are an intimation of the wishes of the testator and not a command.

Digitized by Google

2. **PLEADING: Petition in Two Counts.** Where two counts in a petition are inconsistent with and repugnant to each other, the plaintiff should not be suffered to go on with the case unless he abandons one or the other of such mutually destructive causes.

3. **EVIDENCE: Oral Declarations: Construction.** In an action not to invalidate, but to construe a will, the oral declarations of the testator relating to the meaning of the instruments are not admissible.

4. **WILLS: Construction.** A testator's meaning is to be found in his will alone.

5. **———: Precatory Trust.** A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust and especially no such trust will be implied when it clearly appears that the testator intended to give the devisee full discretion in the use of the property.

Appeal from Cooper Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED.

John Cosgrove for appellant.

W. V. Draffen and *Jeffries & Corum* for respondent.

JOHNSON, J.—This suit was begun in the circuit court of Cooper county, March 20, 1913. The petition was in two counts. In the first plaintiff alleged the invalidity of the last will of her grandfather William E. Toler (which had been duly probated) and prayed "that said pretended paper, writing or will be declared void and of no effect." In the second, she claimed under the will on the theory that it created a precatory trust in her favor. A motion to elect was filed by defendant on the ground "that said counts are inconsistent with each other and the proof of one would disprove

Digitized by Google

the other." This motion was sustained and plaintiff elected to stand upon the second count. Defendant then answered traversing the allegations of that count. The cause was tried without a jury and the court rendered judgment for defendant. Plaintiff appealed.

William E. Toler died in Cooper county June 18, 1911, possessed of a farm of 100 acres of the alleged value of $10,000. He was survived by his wife Ann C. Toler and his son Uriah, the defendant. Plaintiff was the daughter of another son (Columbus), who died before the death of his father. Columbus and Uriah were children of a former marriage. There were no children of the last marriage.

On May 5, 1911, Toler executed the following will: "I, William E. Toler, do make this my last will and testament; I give to my beloved wife, Ann C. Toler, all my property, real, personal and mixed, absolutely, knowing she will deal properly with my grandchild, Gertrude Snyder and my son, Uriah Toler." After the death of the testator, his widow was appointed administratrix of the estate with the will annexed. The personal estate being insufficient to pay the debts, the land was sold under order of the probate court and was purchased by defendant for $8,500. This sale was invalid on account of the insufficiency of the notice but the widow executed and delivered to defendant a quitclaim deed and gave him possession of the farm. Defendant claims title under that deed. He paid the widow $2500 on the purchase price and out of that money she paid all of the debts of the estate, gave $1550 to plaintiff and kept the remainder of about $400 for her own use. She died shortly before the commencement of this action. It appears that the land was of the reasonable value of $8500 and the real bone of contention is the proceeds of its sale to defendant which after deducting the sums expended by the widow in paying debts and for her own use amounted to $7500, of which she gave defendant $6000

Digitized by Google

and plaintiff $1550. Plaintiff contends that by the terms of the will she was entitled to receive one-half of the proceeds, to be put on an equal footing with her uncle, since she was the only child of his deceased brother and it was the obvious intention of her grandfather to create a trust for the equal benefit of her uncle and herself. The position of defendant is that the will clearly evinced an intention to vest the fee simple title to the land in the widow and that the words "Knowing she will deal properly with my grandchild, Gertrude Snyder and my son, Uriah Toler," cannot be construed as having created a precatory trust but gave the widow full power to exercise her own discretion in the disposition of the estate.

There is evidence, introduced by plaintiff, tending to show that the relationship between her father and grandfather always had been of the closest and most affectionate nature; that her father had worked with and for his father and had aided in the accumulation of the money invested in the farm; that her uncle had not been so self-sacrificing but had lived a more selfish life and that she had always been treated affectionately by her grandfather.

The evidence, as a whole, shows, we think, that the old man loved both sons and his granddaughter and that his wife shared his feelings and there is no suggestion in the evidence of any change in her feelings after her husband's death. She bore plaintiff no ill will and if it may be said that she discriminated against plaintiff in the distribution of the estate, the error was one of judgment rather than of a purpose to show partiality.

The will was made during the last illness of the testator. The lawyer who drew it testified (without objection) that the testator, in giving directions for the preparation of the document, said; "I want to give my wife everything I have. I would divide it up if there was enough but if I should divide it up, there wouldn't

Digitized by Google

be enough for anybody and if a man divides his property into different pieces, why the amount I have wouldn't be much for anybody and I am giving it to my wife." The lawyer told him that it would be necessary to mention his son and granddaughter in the will and he inquired, "Is it necessary to give them a dollar?" Being answered in the negative and assured that it would be sufficient if they were mentioned, he said, "Well, just put in there that I give it to my wife. I want her to have it and I know that she will deal properly with them."

Counsel for plaintiff insist that the court erred in sustaining the motion to elect. Overlooking other considerations we hold the motion was properly sustained on its merits. It is true the causes alleged in the two counts purported to relate to the same transaction but they were so inconsistent and repugnant they could not stand together in the same action. The test in such instances is whether or not proof of one cause neccessarily would disprove the other. If it would, the petition is bad, and the plaintiff should not be suffered to go on with the case unless he abandons one or the other of such mutually destructive causes. [Soap Works v. Sayers, 51 Mo. App. 310; Mirrieless v. Railway, 163 Mo. l. c. 492; Drolshagen v. Railway, 186 Mo. l. c. 262.]

In one breath plaintiff averred there was no will and in the next that the will created a trust in her favor. She could not prove either assertion without disproving the other. It would be hard to imagine a more striking example of inconsistent positions. The election of plaintiff to stand on the second count, i. e., on the will, reduced the practical issues of the case to the proposition of whether or not the will created a precatory trust. If it did, plaintiff is entitled to recover; if it did not, she has no case. The judgment was fully responsive to this issue and, we may observe

Digitized by Google

in passing, covered the entire subject-matter before the court for adjudication.

Counsel for plaintiff argue that the court erred in excluding evidence of statements made by the widow relating to the meaning she understood the testator gave to the words "deal properly with my granddaughter, Gertrude Snyder and my son, Uriah Toler." The evidence was properly excluded. This is an action not to invalidate but to construe a will. In such cases oral declarations of the testator relating to the meaning of the instrument are not admissible. As is said in Webb v. Hayden, 166 Mo. l. c. 46: "A testator's meaning is to be found in his will alone; from the will itself we must learn the testator's intent. But if the language employed is of doubtful meaning or susceptible of either of two constructions evidence as to the condition of the testator's feeling toward the persons affected by the will is competent, if it tends to put the court in possession of the facts as the testator viewed them and helps to explain the doubtful passages (Hurst v. Van DeVeld, 158 Mo. 239; Murphy v. Carlin, 113 Mo. 112.)"

In the construction of wills the prime object is to ascertain and enforce the true intent and meaning of the testator (Snorgrass v. Thomas, 166 Mo. App. 1. c. 609, and cases cited), and when the language of the will is of doubtful meaning "the true intent and meaning of the testator can be best ascertained by the courts and those concerned in the execution of the will by putting themselves, so far as may be, in the place of the testator and reading all his directions therein contained in the light of his environment at the time it was made." [Murphy v. Carlin, supra.]

If it may be said that the present will is of doubtful meaning, we think the explanatory evidence should be restricted to the portrayal of the environment of the testator and his feelings towards the persons affected, and should not include declarations he may have

Digitized by Google

made concerning his interpretation of words employed in the will at his direction. Such declarations would be violative of the rule that "a testator's meaning is to be found in his will alone." A formal will would be of little practical value if it could be contradicted, varied or explained by proof of such declarations of the testator.

Passing to the subject of the interpretation of the will, the important question is whether it bespeaks an intent to impose an imperative obligation upon the devisee to regard herself as a trustee of a trust created for the equal benefit of the son and granddaughter of the testator, or an intent that the devisee should become the absolute owner of the estate with only a moral and not a legal obligation resting upon her to deal properly with the son and granddaughter.

In support of her position that a trust was created, we are cited by plaintiff to the cases of Schmucker's Estate v. Reel, 61 Mo. 592, and Noe v. Kern, 93 Mo. 367. In the first case the will contained a bequest to R. "to apply in charity according to his best discretion and I appoint said R. executor of this my will . . . and whereas I hope that R. will consent to act as my executor and desire to save him all trouble and annoyance in that regard and have every confidence, good faith and discretion, and have explained to him to what charities I desire him to appropriate the monies herein bequeathed to him, it is my will that my said executor be held to no accountability whatever for the nonperformance of the trust herein confided to him; he will use his best discretion in the matter and the receipt of the acting Archbishop of St. Louis of the Roman Catholic Church in Missouri or Kansas, shall be a full discharge to him *pro tanto* for any monies applied by him to charities according to my request."

The court said: "There is no mistaking the purport of this language. It all goes to show that the executor took bequests clothed with a trust to carry

Digitized by Google

out certain objects or purposes not defined or expressed in the will."

Strictly speaking the trust in that case did not arise by implication from the use of precatory words. The purpose of creating a trust was clearly expressed and an unequivocal command was laid upon the legatee to devote the legacy to charity and not to any other use and the discretion allowed him was not a discretion to divert the legacy to any other use. In the opinion the court says of that species of implied trusts known to equity as precatory:

"Courts of equity have frequently discussed the question as to the force of words or expressions of recommendation in wills in regard to the use to which the testators might desire the persons to whom they had given legacies to put the same. The prevailing doctrine is, that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish or expectation, will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust. [Peeves v. Baker, 18 Beav. 372 Macnab v. Whitbrad, 17 Beav. 299; Jarn. Wills, 336; 2 Redf. Wills (2 Ed.) 410.]"

In Noe v. Kern, supra, the following bequest was in issue: "I give, devise and bequeath unto my husband . . . all of my real and personal estate absolutely, the real estate being mostly situate in the city of Norfolk, State of Virginia. I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise and educate."

This language was held to create a precatory trust in favor of the children, not on the ground that the words themselves were prima facie sufficient to convert a devise or bequest into a trust but that the words

Digitized by Google

read in the light of evidence portraying the environment of the testatrix and her feelings towards the persons mentioned in the will were strong and convincing evidence of an intent that the precatory language she employed should be understood as voicing a command to do the thing she expressed the hope would be done.

The court seemed to recognize the injustice that might result from giving words of recommendation, request, entreaty, wish or expectation addressed to a legatee or devisee, the fixed, technical meaning of creating a trust and gave approval to the doctrine that "every case must depend upon the construction of the particular will under consideration. The point really to be determined in all these cases is whether, looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect or whether, having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion." [Perry on Trusts (3 Ed.), sec. 114.]

The whole doctrine of precatory trusts has been criticised as being purely artificial, as involving the solecism of reading an imperative command into words of mere recommendation accompanying an absolute devise or bequest. It was well said in Sale v. Moore, 1 Simons, 534, "that the first case that construed words of recommendation into a command made a will for the testator; for everyone knows the distinction between them." Van Duyne v. Van Duyne, 14 N. J. Eq., l. c. 401.] The tendency of modern decisions both in England and America is to avoid such artificial canons of construction and to have regard only to the intention of the testator as gathered from the whole will in determining whether or not such expressions shall create a trust. [Corby v. Corby, 85 Mo. l. c. 393.] "Judges have for some time past shown a decided leaning against the doctrine of precatory trusts and a strong tendency to restrict its operation within reason-

Digitized by Google

able and somewhat narrow bounds; many of the earlier decisions certainly would not be followed at the present day. The courts of this country have generally adopted the doctrine substantially as settled in England, although, perhaps, with some caution and reserve and they all exhibit the modern tendency to limit rather than enlarge its scope." [Pomeroy's Eq. Juris. (3 Ed.), secs. 1014, 1015.]

While, as we have shown, the doctrine is recognized in this State, the modern view that it should serve only as an aid to the ascertainment of the real intention of the testator also obtains. A clear and terse statement of the doctrine is to be found in the following quotation from Corby v. Corby, supra: "A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust and especially no such trust will be implied when it clearly appears that the testator intended to give the devisee full discretion in the use of the property." Where a devise or bequest is absolute it should not be cut down or lessened by mere words of recommendation unless the will, as a whole, clearly shows the testator had in mind the creation of a trust, and not a mere appeal to the discretion of the legatee. [See In re McVeigh's Estate, 164 S. W. 673, where the subject of precatory trusts is extensively and logically discussed by ALLEN, J.]

The most concise and perhaps the most luminous construction of precatory words in the reported cases is found in Fox v. Fox, 27 Beavan, 301, where the bequest was to the wife of the testator "to and for her own use and benefit absolutely having full confidence in her sufficient and judicious provision for my dear chil-

Digitized by Google

dren." The laconic opinion of the Master of the Rolls was as follows:

"I am clear that no precatory trust arises in this case; it is not, however, necessary to go through the authorities, which are not all perfectly reconcilable, but they all establish that the subject-matter must be certain, and the objects to take must be clearly defined.

"Here the testator intends to give his property absolutely to his wife, and he intended, at the same time, to give her a clear intimation of his wishes, but as to which she was to be considered under a moral, and not under any legal obligation."

In the present case we cannot regard the words of recommendation in any other light than as an intimation of the wishes of the testator and not as a command. He intended to give his wife the absolute right to use, enjoy and dispose of the property without restriction or limitation. His son and granddaughter were adults, in no manner dependent upon him, as were the children in the case of Noe v. Kern, supra, and there is nothing in the record to suggest that he intended to make his wife a mere trustee for their benefit. We conclude that the trial judge took a proper view of the case. The judgment is affirmed.

All concur.

CLAUDE HARDWICKE, Respondent, v. RICHARD S. BARNES, Appellant.

Kansas City Court of Appeals, May 4, 1914.

1. **EQUITY: Cancellation of Deed: Suretyship.** The plaintiff instituted this action in equity to cancel a certain deed to land, which is in reality a mortgage executed by the grantor as surety for the payment of a debt of another. *Held*, that anything that would discharge a surety from personal liability to pay the debt of his principal would discharge his property from a lien securing his contract of suretyship.

Digitized by Google

2. ———: ———: ———. Where a mortgage is given to secure the debt of another, for which the mortgagor assumes the liability of a surety, any change in the form of a debt or the terms of payment, as by renewal, extension of time, or otherwise, not assented to by the mortgagor, will discharge the mortgage, unless the mortgage itself contains provisions authorizing such arrangements to be made.

3. ———: ———: ———: **Statute of Limitations.** An equitable action, prosecuted by the holder of an equitable title, to quiet title is in the nature of a real action which could be barred only by ten years adverse possession, the statute does not begin to run until the dispossession of the equitable holder.

Appeal from Platte Circuit Court.—*Hon. A. D. Burnes*, Judge.

AFFIRMED.

Fyke & Snider for appellant.

Guy B. Parks for respondent.

JOHNSON, J.—This is an action in equity begun in the circuit court of Clay county January 22, 1908, for the cancellation of a certain deed to land which is alleged in the petition and shown by the evidence to have been in reality a mortgage executed by the grantor as surety for the payment of a debt of another.

Plaintiff whose title to the land is derived through a subsequent deed of trust executed by the same grantor, alleges the discharge of the surety and consequent extinguishment of the lien of the first mortgage which, however, has not been released of record and is the basis of the claim of title asserted by defendant who for six years before the commencement of this suit had been in possession of the land. The action was tried in Platte county where it was sent on change of venue and judgment was rendered for plaintiff An appeal was allowed defendant to this court but we transferred the case to the Supreme Court on the

Digitized by Google

ground that it involved title to real estate. The Supreme Court thought differently and retransferred it. [See Hardwicke v. Barnes, 161 S. W. 744, 253 Mo. 6.]

The facts of the case are as follows: December 17, 1889, the Thornton Distilling Company, as principal, and Henry P. Linderman and others, as sureties, executed and delivered a promissory note to defendant for $7000, due eighteen months after date. On the same date the company, which had been operating a distillery in Clay county, executed and delivered to S. J. Sandusky, trustee, a trust deed, in the nature of a mortgage conveying certain real and personal property to secure the payment of the note. And on the same date Linderman who, as stated, signed the note as surety, executed and delivered to defendant, a deed in the form of a warranty deed, conveying ten acres of land in Clay county owned by him, for the recited consideration of $5000. This deed, as shown by its face, was in substance a mortgage to secure the payment of the note and provided that "upon the payment of a certain note for $7000, this day executed by the Thornton Distilling and Milling Company to the said Richard S. Barnes and which note was signed by said H. P. Linderman, the real estate aforesaid is to be deeded by said Richard S. Barnes, back to said Linderman." This deed was not filed for record until August 3, 1891. The ten acres conveyed in it is the land involved in the present controversy.

Afterward Sandusky, as trustee, and defendant as *cestui que trust* of the trust deed executed by the company, brought suit as plaintiffs in the circuit court of Clay county, returnable to the October term, 1892, to recover judgment on the $7000 note and to foreclose the lien of the deed of trust. Linderman was joined as a defendant and duly served with process. The record of that case, including the judgment rendered therein, was received in evidence over the objection of defend-

Digitized by Google

ant who insisted and still insists that it was *res inter alios acta.*

The record of the hearing and judgment discloses that the merits of the cause were adjudicated doubtless in accordance with an agreement the parties had reached before the hearing. It was adjudged that there was still due on the $7000 note a remainder of $1921, and personal judgment was rendered in that sum in favor of Barnes (the present defendant) against the Distilling Company, the principal obligor of the note, and a foreclosure of the lien of the mortgage of the company securing the note was adjudged. But judgment was rendered in favor of the sureties on the note, including Linderman, on the ground, as we understand the record, that they had been released by an extension of time Barnes (the payee) had granted to the Distillery Company without the consent of the sureties.

Defendant's claim of title is based on the deed from Linderman which, as we have shown, was in reality a mortgage to secure a debt upon which his liability was that of a surety and from which he was subsequently released by the judgment of a court of competent jurisdiction. We now turn to the facts on which the claim of plaintiff is founded.

On January 28, 1891, Linderman and his wife executed and delivered to Samuel Hardwicke as trustee for W. C. Lemon, a deed of trust conveying ten acres of land above mentioned to secure notes of Linderman to Lemon, amounting to $1400. Hardwicke, the trustee, was the father of plaintiff and father and son were practicing law in Liberty as partners and incidentally were doing business as loan brokers. Linderman, who was in financial difficulties, and was threatened with a forced sale of some of his property, applied to Hardwicke & Hardwicke for relief and they had him execute the notes and the trust deed to Lemon who had his office with them, in the hope that they might sell the notes for the benefit of Linderman. They were dis-

Digitized by Google

appointed and afterward they, themselves, advanced about $900, for the account of Linderman and on the security of the notes and trust deed. Lemon, as payee, indorsed the notes without recourse and delivered them to Hardwicke & Hardwicke who continued to hold them and the trust deed as security for Linderman's debt to them. Hardwicke, senior, died in 1895, and plaintiff succeeded to his interest in the transaction. In 1892, Linderman becoming completely submerged in his financial difficulties surrendered possession of the ten acres to Hardwicke & Hardwicke and they remained in possession, by tenants, until the death of Hardwicke senior, when the possession was continued in plaintiff by his tenants until 1901 or 1902. At that time defendant obtained possession of the land and has since kept it. There are other facts in the record but those stated control the disposition of the case.

There can be no question of the validity of plaintiff's claim to the possession of the land as against Linderman and all others except defendant. The Lemon notes were valid obligations of Linderman to the extent of the advances plaintiff made upon those notes and the deed of trust securing them, and the subsequent delivery of possession of the land to plaintiff invested him with the right to hold possession against Linderman and all who might claim under him, except the holder of a lien prior to that of the Lemon deed of trust. The controlling issue in the case is the validity of defendant's claim founded on the deed in the nature of a mortgage which Linderman executed and delivered to defendant more than a year before the date of the Lemon notes and trust deed. We shall ignore the fact of the withholding of that deed from record and treating it as though filed before the beginning of the Lemon transaction we hold that it gave defendant a lien on the land superior to that subsequently created in favor of plaintiff. But that lien was for the security of the obligation Linderman had incurred as surety for the

Digitized by Google

Distillery Company. It was incidental to the contract of suretyship and when the obligation created by that contract was released the incidental mortgage lien *ipso facto* was released. Anything that would discharge a surety from personal liability to pay the debt of his principal would discharge his property from a lien securing his contract of suretyship. [Johnson v. Bank, 173 Mo. 171; White v. Smith, 174 Mo. 186; Higgins v. Harvester Co., 181 Mo. 301.]

The rule thus stated in 27 Cyc. 1413: "Where a mortgage is given to secure the debt of another, for which the mortgagor assumes the liability of a surety, any change in the form of the debt or the terms of payment, as by renewal, extension of time, or otherwise, not assented to by the mortgagor will discharge the mortgage, unless the mortgage itself contains provisions authorizing such arrangements to be made."

The record in the foreclosure suit brought against the Distillery Company and the sureties on the $7000 note shows a final judgment on the merits discharging the sureties including Linderman. It is true the lien sought to be foreclosed was not the same as that created by Linderman's mortgage but the debt for which personal judgment was prayed was the same and the effect of that judgment being the complete discharge of Linderman from the obligation he had assumed as surety, the discharge of the incidental lien followed as a matter of course and thereafter no claim of title or possession could be predicated of the extinguished lien.

It is idle to speak of that suit as *res inter alios acta* because plaintiff was not a party to it. As the holder of the junior lien he was privy in representation to Linderman and could assert any defense to the first mortgage available to Linderman. [Coleman v. Cole, 158 Mo. 253; Storage Co. v. Glasner, 169 Mo. 48; Jones on Mortgages (2 Ed.), sec. 746.] We do not sanction the contention that this suit was not begun until limitations had barred the action. The notes held by plain-

Digitized by Google

tiff matured in January, 1892, and the act of 1891 (Sec. 1892, R. S. 1909) is not applicable. This being an equitable action, prosecuted by the holder of an equitable title, to quiet title is in the nature of a real action which could be barred only by ten years adverse possession. [Mylar v. Hughes, 60 Mo. 105; Norfleet v. Hutchins, 68 Mo. 597; Haarstick v. Gabriel, 200 Mo. 237.]

Plaintiff was not dispossessed until 1902, and the action being instituted in 1908, was not barred since limitations did not begin to run until the dispossession of plaintiff.

The judgment is affirmed. *Ellison, P. J.*, concurs; *Trimble, J.*, not sitting, having been of counsel.

PITTSBURG STEEL COMPANY, a Corporation, Appellant, v. L. W. COTTENGIN, Respondent.

Springfield Court of Appeals, April 14, 1914.

1. **SALES: Contract of: Modification and Substitution: What is Not.** A contract of sale is not modified nor substituted by a new one, where such contract provided for payment of freight by the vendor and upon the arrival of the goods, freight not having been prepaid, the vendor's agent induced the vendee to accept the goods and pay the freight as so much of the purchase price to be credited on such purchase price when the freight bill was sent to the vendor.

2. **CONTRACTS: Written: Parol Evidence Inadmissible, When.** In order to make parol evidence of a term of a contract inadmissible, the written contract must be complete on its face, free from ambiguity and not contradictory of itself.

3. **APPELLATE PRACTICE: Abstract to Contain What: Rule.** Court rule number 15, which provides that the abstract of the record shall "set forth so much of the record as is necessary to a full and complete understanding of all the questions," is not complied with by a reference therein to the original bill of exceptions.

Digitized by Google

4. **CONTRACTS: Written: Ambiguity: Parol Evidence to Explain.** Instance of a written contract which is so ambiguous as to admit oral evidence of the circumstances and reasons for making the contract and showing the true understanding and meaning of same.

Appeal from Wright County Circuit Court.—*Hon. C. H. Skinker,* Judge.

AFFIRMED.

Jackson & Jackson for appellant.

(1) Antecedent or contemporaneous verbal stipulations under such facts as shown in this case are inadmissible to vary or contradict a written contract. Helmrichs v. Gehrke, 56 Mo. 79; Bank v. Bank, 149 S. W. 495; McDaniels v. United Rep. Co., 165 Mo. App. 678, 148 S. W. 464; Wheless v. Grocery Co., 140 Mo. App. 572, 120 S. W. 708. (2) Even in cases of ambiguity in a written contract the parties may not say in plain terms what was the intention, and parol evidence is admissible not for the purpose of contradicting the writing but for the purpose of explaining the ambiguity by directing the court to the intent of the *writing* so that the *writing* may be sustained as the true contract of the parties. McDaniels v. Railroad, 165 Mo. App. 678; Wheless v. Grocery Co., 140 Mo. App. 572; Dec. Dig. Evidence, par. 448, pages 1245-6; Cameron v. Sexton, 110 Ill. App. 381. (3) The court should have instructed the jury that if said G. L. Robinson had no authority to make any contract other than one entered into in writing on blank written order forms prepared for the company that they should find the issues for the plaintiff, as prayed for in instruction number 3 by plaintiff. Bronson v. Implement Co., 135 Mo. App. 483, 116 S. W. 20; Huffcut on Agency, page 135, par. 106; White & Co. v. Massy, 65 Mo. App. 260; Carson, Pierie Scott & Co. v. Culver, 78 Mo. App. 597; Lencke & Co. v. Cohen, 129 S. W. 1002.

Digitized by Google

Mansfield & Cox for respondent.

(1) An ambiguous contract may be explained and the condition of the parties at the time and the reasons for making the contract and the circumstances under which it was made may be shown by parol. Bertig-Smythe v. Lumber Co., 112 Mo. App. 259, 267; Thetford v. Ins. Co., 140 Mo. App. 254, 257; Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 314-315. (2) The construction put upon the contract by the parties who made it was admissible. Construction Co. v. Tie Co., 185 Mo. 25, 73. (3) The authority of an agent is as great as the necessities of the business in which he engages for his principal and when the principal puts the agent forward as having full authority as to the particular matter involved or places the agent in a position where others are justified in the belief that his powers are general as to the matter involved, then limitations on his authority imposed by the principal do not affect those with whom he deals unless notice of the limitation is brought home to the party. Baker v. Railroad, 91 Mo. 152, 159; Porter v. Woods, 138 Mo. 539, 550, 551; Woolen Mills v. Meyers Co., 43 Mo. App. 124, 130; Meier v. Proctor & Gamble Co., 81 Mo. App. 410, 418; Railroad v. Railroad, 110 Mo. App. 300, 309; Rice v. Groffman, 56 Mo. 434; McNichols v. Nelson, 45 Mo. App. 446; Harrison v. Railroad, 50 Mo. App. 332, 337; Edwards v. Thomas, 66 Mo. 468, 482-483.

STURGIS, J.—This suit grew out of a dispute as to whether the plaintiff as seller or the defendant as buyer should pay the freight on certain wire fencing sold and shipped by plaintiff to defendant. The defendant is a country merchant doing business at Grove Springs, Missouri, but whose railroad station is Niangua, Missouri, and plaintiff's business and location is indicated by its corporate name. The terms of the sale are shown by a written order or contract signed

Digitized by Google

by defendant and attested by plaintiff's salesman, who called on defendant and solicited this order. The petition counts on goods, wares and merchandise sold and delivered to defendant, amounting to $415.72, and admits payment of $330.72 thereof, leaving a balance due of eighty-five dollars. The defendant pleads payment in full, which is explained by his having paid the freight amounting to eighty-five dollars, while plaintiff claims that the written order requires defendant to pay the freight and that this amount so paid cannot be credited on the purchase price. The jury found for defendant.

The evidence abundantly shows that the real agreement made between the defendant and plaintiff's salesman was that the plaintiff would pay the freight. If the evidence showing this real agreement is admissible, then the verdict is abundantly sustained. When the goods arrived at the local railroad station and defendant found the freight was not prepaid he refused to receive the same and the car stood on the track several days. Thereupon plaintiff's salesman, the same one who had taken the order originally, explained to him that while the agreement was that the plaintiff should pay the freight, yet that defendant should pay the same to the railroad, receive the goods and on sending in the freight bill the amount so paid would be credited on the purchase price. The defendant thereupon did this. This later arrangement is spoken of during the trial as a new agreement on the part of plaintiff to pay this freight and is sought to be repudiated by plaintiff on the ground that this salesman had no authority to make such agreement or to change the written contract, as his authority ended with his taking the order and transmitting it to the plaintiff. [Groneweg & Co. v. Estes, 144 Mo. App. 418, 128 S. W. 786.] On the other hand, defendant contends that as the salesman had authority to sell goods, fix prices, etc., he would have power to contract with reference to the payment of the freight

Digitized by Google

on same as a necessary incident to selling goods to be delivered at distant points and that such authority would not be lost at least until the goods sold were actually delivered. The defendant argues in support of the salesman's authority to bind his principal to pay the freight the familiar rule of law that the authority of an agent is as great as the necessities of the business in which he engages for his principal and when the principal puts the agent forward as having full authority as to the particular matter involved, or places the agent in a position where others are justified in the belief that his powers are general as to the matter involved, then limitations on his authority imposed by the principal do not affect those with whom the agent deals unless notice of the limitation is brought home to the other contracting party. [Porter v. Woods, 138 Mo. 539, 550, 39 S. W. 794; Meier v. Proctor & Gamble Co., 81 Mo. App. 410, 418; McNichols v. Nelson, 45 Mo. App. 446, 452.]

But we think it is apparent that plaintiff's selling agent and the defendant were not making or intending to make a new contract or to modify the old one with reference to the payment of this freight. Defendant was maintaining that the original written order for the goods provided for plaintiff paying the freight and that he would not accept same on any other terms. According to defendant's evidence, the salesman conceded that such was the original contract and he merely induced defendant to accept the goods by paying the freight as so much of the purchase price and to be credited thereon on sending in the freight bill—a common method of doing business when the freight is to be paid by the shipper. There was therefore no new or modified contract made or attempted to be made and the selling agent's authority to make one is not material.

The original contract is in writing and it is contended by plaintiff that it shows on its face that de-

Digitized by Google

fendant was to pay the freight in dispute on the wire fencing; and also shows on its face that it was not to be a completed contract until accepted by the plaintiff. This being the case, the plaintiff only accepted the contract as written and that alone became and was the contract of the parties. The plaintiff unsuccessfully objected to all the oral evidence of defendant tending to show that the real agreement of the parties provided that plaintiff should pay this freight, the grounds of the objections being that the terms of a written contract cannot be changed, added to, modified or contradicted by parol evidence. This is undoubtedly good law, provided, of course, that the written contract is complete on its face, free of ambiguity and not contradictory of itself.

As plaintiff is the appellant, it is incumbent on it to so present its case to this court as to show that the contract in question is such as it claims, that is, that it provides in unambiguous terms that defendant had to pay the freight. We find, however, that while this case is brought here on what is known as the short form, plaintiff's abstract of the record nowhere sets out a copy of the contract order relied on or even the substance thereof but refers us to the "bill of exceptions" for such information. The rules of this court (see Rule Fifteen) and of all the other appellate courts of this State provide, and necessarily so for an intelligent procedure on appeals, that the abstract of the record shall "set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision," and we cannot be referred to the original bill of exceptions for such information. [Merrill v. Central Trust Co., 46 Mo. App. 236, 242; Coleman v. Roberts, 214 Mo. 634, 114 S. W. 39; Sonnenfeld v. Rosenthal, 247 Mo. 238, 265, 152 S. W. 318; Strother v. Barrow, 246 Mo. 241, 254, 151 S. W. 960.] The respondent, however, has in a manner aided the appellant by setting forth in an addi-

Digitized by Google

tional abstract the substance and sort of description of the contract, the correctness and sufficiency of which are not challenged.

The order for the goods in question seems to have been written in technical and abbreviated mercantile terms not easily understood by us and perhaps not by defendant, a country merchant, and he so testified. We surmise that the difficulty of understanding and reproducing this order in an intelligible form is the reason appellant did not attempt to do so in his abstract but he has not taken the proper steps to bring the original here; if indeed that would aid the matter, of which we have serious doubts. It is shown that at the end of the order and immediately preceding the defendant's signature are the words "All above F. O. B. Niangua," and that Niangua is the railway station to which the goods were shipped for defendant. It also appears that the order was made out on a rather lengthy and comprehensive blank form, with the abbreviation "F. O. B." appearing in several places in the order blank but generally in connection with classes of goods not contained in this particular sale and no place is named in connection therewith. In one place, however, this line occurs: "Fencing 74 1-2 per cent off list F. O. B. Pbg.," the "Pbg." being in pencil. This it is claimed means F. O. B. Pittsburg, and charged defendant with the payment of the freight from Pittsburg, the initial point of the shipment. It should be here said that there are several other classes of goods covered by this order and on them plaintiff concedes that it was to pay the freight to Niangua, its contention being, as we understand it, that the words "All above F. O. B. Niangua" apply only to the goods other than fencing. The defendant testified that he understood the meaning of F. O. B. and correctly interpreted "F. O. B. Niangua" to mean that plaintiff would deliver the goods free at Niangua. He says he noticed the words, just preceding where he signed, "All above

Digitized by Google

F. O. B. Niangua," and knowing that such was the agreement he did not carefully read the whole order, especially the printed part, and did not notice the letters "Pbg." in the connection above mentioned, and would not have understood the same if he had noticed them. No one testified that Pbg. meant Pittsburg and we would hesitate to hold that it is such a well-known abbreviation that plaintiff should be conclusively held to have so understood it. If his side of the controversy is to be believed, as the jury did, then both the salesman and defendant intended to so fill out the order as to have *all* the goods purchased delivered free at Niangua, and that such was the understanding is clearly shown by the subsequent acts of the parties. We think we are abundantly justified in holding that the written order is so far ambiguous as to admit oral evidence of the circumstances and reasons for making the contract and showing the true understanding and meaning of the same. [Bertig-Smythe v. Lumber Co., 112 Mo. App. 259, 267, 86 S. W. 870; Thetford v. Insurance Co., 140 Mo. App. 254, 257, 124 S. W. 39; Kneisley Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 314, 88 S. W. 774; Wheless v. Grocer Co., 140 Mo. App. 572, 584, 120 S. W. 708.]

The jury under a proper instruction found that the real contract of the parties was that plaintiff was to pay the item of freight and hence cannot collect same from defendant. All the errors complained of relate to this proposition and need not be noticed further. It results that the judgment is affirmed.

Robertson, P. J., concurs. *Farrington, J.*, concurs.

Digitized by Google

J. W. RAY, Administrator of the Estate of W. F. STEELE, Appellant, v. M. C. McCONNELL, Respondent.

Springfield Court of Appeals, April 14, 1914.

1. **PROMISSORY NOTES: Statute of Limitations: Part Payment.** Indorsements on a note do not prove themselves and the mere production of the note, otherwise barred by limitation, with credits endorsed thereon under dates which apparently revive or prolong the life of the note until after the time suit is brought, will not, without further proof, make a prima-facie case and remove the bar of limitations.

2. **———: Removal of the Bar of the Statute of Limitations: Partial Payments: When Sufficient.** Although a part payment on a note removes the effect of the Statute of Limitations, yet, where one relies for proof of such payment on an indorsement on the note, there must also be proof that the indorsement was made either by or for the holder of the note or with the knowledge and consent of the maker and if made by or for the holder, that it was actually placed on the note at a time when it was against the interest of such holder to make it, that is while the note was yet alive.

3. **———: ———: ———: Evidence Reviewed.** Evidence examined and considered sufficient to establish a prima-facie case for the jury of partial payments on a promissory note, sufficient to remove the bar of the Statute of Limitations.

Appeal from Greene County Circuit Court.—*Hon. Arch A. Johnson,* Judge.

REVERSED AND REMANDED.

Barrett & Moore and *Gideon & West* for appellant.

(1) The law is, that it is necessary in order to remove the bar of the statute to show, either by proof that the credit was actually made by the owner of the note, or by his direction at a time when the note was not barred, or by more direct evidence that the judgment was by the maker at such time. If it be shown that the

Digitized by Google

credit was endorsed on the note by the holder at a time when it was not barred, and consequently was against his interest to have made it, this furnishes prima-facie evidence that the payment was made at the time, and in absence of a showing to the contrary the note will not be barred. Berryman v. Becker, 158 S. W. 899-901; Haver v. Schwyhart, 39 Mo. App. 303; Berryman et al. v. Becker et al., 150 S. W. 901.

J. T. White and *Roscoe Patterson* for respondent.

(1) The endorsements on the notes did not prove themselves and the evidence is insufficient to show that payments were made on the dates of said endorsements or that they were made with the consent of the payor. It does not show that such endorsements of credits were made at the dates they purported to have been made. Crow v. Crow, 124 Mo. App. 120; Berryman v. Becker, 158 S. W. 899; Gardener v. Early, 78 Mo. App. 346; Haver v. Schwyhart, 39 Mo. App. 303; Briscoe v. Huff, 75 Mo. App. 288; Goddard v. Williamson, 72 Mo. 131; Smith v. Brinkley, 151 Mo. App. 494; Brown v. Carson, 132 Mo. App. 371; Freeze v. Lockhard, 87 Mo. App. 102 (2) All these authorities are to the effect that in order to rescue the notes from the bar of the statute by reason of credits, it must be shown either that payments were actually made on the note, or that the credits were entered upon the note with the consent of the maker or else were entered upon the note at a time when it was against the interest of the payee to make them, and when they purport to have been made.

STURGIS, J.,—This is a suit on two promissory notes for one hundred and fifty dollars ($150), each, signed by defendants and payable to plaintiff's intestate. The notes are dated May 7, 1888, payable one day after date. The suit was commenced on July 14,

Digitized by Google

1913, and the defense is the Statute of Limitations. The plaintiff relies on certain payments endorsed on the notes as being sufficient to take the case out of such statute. On one of the notes the following payments appear endorsed thereon: August 27, 1896, $15; July 9, 1897, $18; May 12, 1902, $25; March 1, 1904, $25; December 21, 1904, $25. On the other note the following payments are endorsed: November 14, 1896, $10; June 2, 1900, $100; September 6, 1900, $50; June 1, 1901, $50; March 1, 1907, $10; August 6, 1910, $15.50. Each of these payments is evidenced by an endorsed receipt on the back of the notes bearing the dates as above stated.

These endorsements were proven to have been made by W. F. Steele, deceased, the payee and owner of the notes, and are in his handwriting. No actual payments are proven to have been made and the question for decision is whether there is sufficient evidence showing when the endorsements were actually placed on the notes to make a prima-facie case for plaintiff and thereby take the case to the jury. The trial court, after plaintiff's evidence was in, directed a verdict for the defendants.

The defendants correctly contend that endorsements on a note do not prove themselves and the mere production of the note, otherwise barred by limitation, with credits endorsed thereon under dates which apparently revive or prolong the life of the note until after the time suit is brought will not without further proof make a prima-facie case. Such has been the law of this State since the decision of Goddard v. Williamson, 72 Mo. 131. [See Smith v. Brinkley, 151 Mo. App. 494, 132 S. W. 301.]

It is the acknowledgment by the maker that the note evidences an existing and yet unpaid debt that breathes life into it if already dead or prolongs its life for the statutory period from the date of the acknowledgment. A partial payment thereon is such an acknowledgment. [Haver v. Schwyhart, 48 Mo. App. 50.]

Digitized by Google

When there is no proof of an actual payment other than an endorsement of the same on the note, then proof of two other essential facts must be made, to-wit: (1) That the endorsement of the payment was made either by or for the holder of the note or with the knowledge and consent of the maker; (2) if made by or for the holder, that the endorsement was actually placed on the note at a time when it was against the interest of such holder to make it, i. e., while the note was yet alive. It is the fact that the endorsed payment is an admission against interest that gives it its probative force and, of course, if made by the holder after the bar of the statute is complete, it would not be against interest. The holder of a deed note could well forgive part of it in order to collect the balance. Such is our ruling in the recent case of Berrymen v. Becker, 173 Mo. App. 346, 158 S. W. 899, and in this we follow Haver v. Schwyart, 39 Mo. App. 303; Crow v. Crow, 124 Mo. App. 120, 128, 100 S. W. 1123; Briscoe v. Huff, 75 Mo. App. 288, 290; Brown v. Carson, 132 Mo. App. 371, 111 S. W. 1181; Goddard v. Williamson, 72 Mo. 131, 133.

In some of the above cases the court speaks of proof of *payment* being made when obviously it is speaking of proof of the *endorsement* of payment being made, which, as we have seen, when shown to have been made by the holder at a time when against his interest, becomes evidence of payment being made at such time. So, also, there are expressions used to the effect that the proof must show that the endorsement of the credit was made "at the time it purports to have been made," but obviously such expressions are merely incidental to the particular case or the word time, as there used, has reference to the whole period coextensive with "against interest." If, for instance, an endorsed payment purports by its date to have been made two or three years prior to the time the note would otherwise be barred, it would obviously be sufficient to prove that such endorsement was actually on the note one year before

Digitized by Google

such time. So, in the present case, the first credit on each of the notes sued on is dated in 1896, the one on August 27th, the other November 14th, considerably more than a year prior to the end of the limitation period of ten years from the notes' date. A witness testified that she calculated the interest on these notes in 1896, and these endorsements were then on said notes. Had she testified that she saw the notes in 1897 and the endorsements of these payments were at that time on the same, this would certainly have been sufficient, as the proof would have shown an endorsement made by the holder on the notes at a time when it was against his interest.

We think also that when an endorsed payment bears a date which is in time to toll the Statute of Limitations, the note being yet alive, then, as it would be still further against the interest of the payee to have given it a date earlier than the actual payment evidenced by it, it will be further presumed that the payment was made, if at all, on the date of the endorsement. We, therefore, hold, and this proposition is not seriously contested, that there was sufficient proof that the first endorsement of payment on each of the notes, being in the hands of the payee, were actually placed by him on the notes at a time when against his interest and, therefore, make a prima-facie case of actual payments at such times.

This, without more, would extend the life of each note for a period of ten years after the dates of the respective payments on each, to-wit, to August 27, 1906, on one note, and to November 14, 1906, on the other; and would make any later endorsements of payments, if shown to have been actually made before such dates, prima-facie evidence of payments on the dates they purport. This suit was commenced on July 14, 1913, and unless it was shown prima facie that some payment was made on each of such notes within ten years before such date, to-wit, after July 14, 1903, then such

Digitized by Google

notes are barred by the statute, notwithstanding any prior payments thereon. There are two endorsed payments upon each note answering this description. If the endorsements of these subsequent payments are alone relied on as prima-facie evidence of such payments, then it must be shown that the payee of the notes made such endorsements at a time when the notes were not barred, to-wit, within ten years after the last proved endorsements. In other words, to make a prima-facie case even, there must be some evidence other than what is shown by the endorsements themselves that such endorsements were entered on the notes after July 14, 1903, and within ten years after a previous proved endorsement.

Was there any evidence adduced sufficient to take this question to the jury? We think there was. The daughter of plaintiff's intestate testified that she had lived with and near her father during all these years; aided him in looking after his business, and always calculated for him the interest on these notes, they being handed to her for that purpose. She testified that she figured the interest frequently; that she figured the interest in 1896, and only one payment was on each note at that time; when her father wanted a settlement out of defendants he would have her figure the interest, so he would know what the interest was before he went to them for it; she could not remember the dates she saw the other endorsements but remembered figuring the interest all along as they were put on; she said they were put on about the times of those dates; she could tell by looking on the notes but could not remember the dates; she remembered they were along there as she figured the interest; they were on there one after another about the times of the dates that are there. On cross-examination she said: I can't remember the dates, only remember along as I figured interest, these credits were there, because I figured it every once in a while, sometimes once, sometimes twice a year; I can

Digitized by Google

remember there were credits one after another on there, because I figured it ever since there was a credit on those notes.

We think this evidence and the reasonable inferences to be drawn therefrom by the jury sufficient to make a prima-facie case to go to the jury under the law as above stated. The case is therefore reversed and remanded for new trial.

Robertson, P. J., concurs. *Farrington, J.*, concurs.

CLINTON WILT, Respondent, v, L. L. HAMMOND and J. R. HAMMOND, partners, composing the firm of HAMMOND BROTHERS, Appellants.

Springfield Court of Appeals, April 14, 1914.

1. **CONTRACTS: Waiving Strict Compliance Temporarily: Effect as to Future.** A strict compliance with some of the terms of a contract may be waived, for the time being, by the parties thereto without such parties binding themselves to a continuance of such waiver; and they may, on a reasonable notice, demand a strict compliance with the terms of the contract in the future.

2. **———: Changes or Additions: Must be Consideration for.** A contract cannot be modified or changed, nor can new conditions be added thereto, without a new consideration.

3. **———: Promise Consideration for Promise: Must be Mutuality.** While one promise is a consideration for another, yet there must always be mutuality as to such promises to make the contract valid and binding.

4. **———: Consideration: What Sufficient: Mutuality.** While the annulling of a previous contract or the substitution of a new one for it or the acting on the new contract as modified, may be a sufficient consideration to support a new or modified agreement, yet such cancelling, substitution or acting on the new contract must apply to both parties or affect the contract with reference to both.

5. **CONTINUANCE: Preventing by Admissions: Diligence: Motives for Absence: Inquiry Concerning not Admissible.** Where,

Digitized by Google

to avoid a continuance, the evidence of an absent witness as set forth in the application is admitted as and for his evidence, it is not proper to inquire during the trial as to the diligence used to have the witness present nor as to the motive of the party using the evidence in not having the witness present nor of the witness in not attending, such matters being immaterial.

6. **CONTINUANCE: Absent Witness: Testimony Admitted: What May be Shown.** It is proper to show on cross-examination of a party who applies for a continuance because of an absent witness, the evidence as set forth in the application being admitted as the evidence of the absent witness to avoid continuance, that the absent witness was in the employ of the applicant, for the purpose of showing the interest of the witness.

7. **CONTRACTS: Breach of: Damages: Measure.** In an action for damages for breach of contract to sell ice to plaintiff, for retail trade, where it was not possible or practicable to buy ice on the market so as to lessen the damages, the measure of damages would be the loss of profits under proof of the proper facts as to the certainty of such loss.

Appeal from Greene County Circuit Court.—*Hon. Arch A. Johnson,* Judge.

REVERSED AND REMANDED.

T. J. Gideon & Sons and *Mann, Todd & Mann* for appellants.

(1) Because this being a suit based in the petition upon a modification of the written contract, and there being an absolute absence of any evidence tending to show a consideration for said modification, plaintiff failed to make out his case and defendant's demurrer should have been sustained. McFarland v. Heim, 127 Mo. 333; Wear v. Schmelzer, 92 Mo. App. 323; Grath v. Mound City Roofing Tile Co., 121 Mo. App. 249; Zerr v. Klug, 121 Mo. App. 292; Moomaw v. Emerson, 80 Mo. App. 322; Wilson v. Russler, 91 Mo. App. 281; Merrill v. Central Trust Co., 46 Mo. App. 243. (2) The court erred in admitting plaintiff's exhibits E, F, G and

Digitized by Google

H, those being the statements rendered weekly by the defendants to plaintiff for ice furnished up and including May 10, 1911, for the reason that the written contract is plain and unambiguous in providing for daily payments. This being so, the court will look to the words of the contract and will not look to the interpretation made by the parties. Wetmore v. Crouch, 150 Mo. 682; Meissner v. Standard Ry. Equipment Co., 211 Mo. 112; Bader v. Chicago, M. & L. Co., 134 Mo. App. 144; Holliday v. Lesh, 85 Mo. App. 285; Smith Drug Co. v. Saunders, 70 Mo. App. 221. (3) The court erred in admitting over the objection of the defendants that portion of the affidavit for continuance relating to diligence in attempting to procure the attendance of witnesses. Osborn v. Emery, 51 Mo. App. 408; Thiele v. Citizen's Ry. Co., 140 Mo. 319. (4) The court erred in giving plaintiff's instruction No. 5 on the measure of damages. Because the true measure of damages in this case, if plaintiff was entitled to recover at all, would be the difference between the contract price and the market price at the time of the breach of contract, if there was a breach. Brown v. Trinidad Asphalt Mfg. Co., 210 Mo. 260-273.

Neville & Gorman, W. H. Horine and *J. T. White* for respondent.

(1) The trial court did not err in overruling defendants' demurrer to the plaintiff's evidence. An executory contract, or one partly executory, may be modified by the parties thereto, and the abandonment of the original terms of the contract is sufficient consideration for the modification. Besides, acting on the contract as modified, is an abandonment of the original contract, and is sufficient consideration. Cannon Weiner Co. v. Boswell, 117 Mo. App. 473; Pottery Co. v. Folckemer, 131 Mo. App. 105; Welch v. Mische, 154 Mo. App. 728; Chambers v. Board of Education, 60 Mo. 370; Mulliken

Digitized by Google

v. Haseltine, 160 Mo. App. 9; Tausig v. Mill & Land Co., 124 Mo. App. 209; Pressed Brick Co. v. Ban, 76 Mo. App. 380; Day v. Insurance Co., 88 Mo. 325; Scriba v. Neely, 130 Mo. App. 258; Sundmacher v. Lloyd, 135 Mo. App. 517. (2) The exhibits E, F, G and H were admitted without objection until after they were read to the jury, and then defendants objected to the form of the receipts, not the substance, objected because they were made in the name of Hammond Brothers' Ice and Cold Storage Company instead of Hammond Brothers, and for no other reason. They were properly admitted, even if they had been a timely objection. They were offered not to show how the parties interpreted the original contract, but to corroborate the plaintiff's testimony that it was charged, and that the parties acted upon it as modified and as pleaded. Cannon Weiner Co. v. Boswell, 117 Mo. 473; Welch v. Mischke, 154 Mo. App. 728. (3) It was not error to permit plaintiff to read a portion of the affidavit for continuance. The only part to which defendants specifically object in their motion for new trial is the sentence, The residence of the witness J. A. Turley is unknown to defendants at this time. Hammond who swore to that, had just testified that Turley was in his employ at the time in Kansas City, and he knew it. It was offered to contradict him on this material issue. State v. Hayes, 78 Mo. 307; Bogie v. Noland, 96 Mo. 85; Bank v. Nichols, 202 Mo. 309. (4) The instruction on the measure of damages, No. 5, was correct. It is now well settled that damage to plaintiff's business caused by the wrong doing of defendant may be recovered, and that damage may be measured by the loss of whatever profits plaintiff can prove with reasonable certainty he would realize but for the wrong done him, whether it is a violation of contract or a tort. Gildersleeve v. Overstolz, 90 Mo. App. 518, 524, 525-528, and 530-531; Shouse v. Neiswanger, 18 Mo. App. 236, 245, 250; Oth v. Railroad, 162 Mo. App. 607, 617;

Digitized by Google

Carter v. Railroad, 128 Mo. App. 57, 64; Cline v. Brock and Knight, 150 Mo. App. 431; Anderson v. Savoy, 118 N. W. 217; More v. Knox, 64 N. Y. S. 1101; Currie Fertilizer Co. v. Kish, 74 S. W. 268, 269-720; Western Union Telegraph Co. v. Delcher, 115 S. W. (Tex.) 624; Talcott v. Freedman, 113 N. W. 13; Sun Mg. Co. v. Egbert, 84 S. W. 667; Pitman v. Boch Queensware Co., 106 S. W. 724; Byson v. McCone, 53 Pac. 637; 13 Cyc. Law & Pro. 51-52-54; 35 Cyc. Law & Pro. 641, 644.

STURGIS, J.—This suit is for damages for breach of a written contract, alleged to have been modified by parol, to sell ice to plaintiff during the year 1911. The defendants were manufacturers of ice and the plaintiff was contracting the same under his trade name for sale at retail. The written contract is as follows: "April 3, 1911. Hammond Brothers, party of the first part, agrees to furnish the Clinton Wilt Ice & Fuel Co., of Springfield, Mo., party of the second part, 800 tons (eight hundred tons) of ice at $4.50 per ton; this ice to be delivered to their wagons at such places as we may designate. And party of the second part agrees to purchase of the party of the first part 800 tons (eight hundred tons) of ice at $4.50 per ton during the year 1911. Second party agrees to pay cash each day on delivery of this ice to them." The plaintiff alleges that this contract was subsequently modified "so that payment was to be made at the end of each week for ice delieved during such week." Defendants by their answer admits the making of the written contract; deny that same was modified in any way; allege that they were ready and willing to comply with their contract; that they designated Hammond Brothers' (defendants) Ice Plant in the north part of the city as the place of delivery and that the plaintiff refused to comply with said contract. By replication the plaintiff denied that the defendants' ice plant was within the contemplation of the parties as a place to be designated for delivery

Digitized by Google

of ice to plaintiff, as it was too inconvenient and not so designated in good faith and the defendants kept ice at another place in the south part of the city more convenient to plaintiff and could readily have delivered it there. On these issues the case went to a jury, resulting in a verdict for plaintiff for $1687.40.

The most important point here is as to there being any valid modification of the written contract. While this contract is spoken of as of date April 3, 1911, when it was drawn up and signed by plaintiff, the evidence is that it was not signed by defendants until two or three weeks later and in the meantime some dispute arose as to delivering ice thereunder and plaintiff had his attorneys write defendants a letter demanding a compliance with their contract. As showing a modification of the contract, plaintiff testified that in a day or two after such letter was mailed that Hammond came over to his office and they talked the matter over thoroughly and he (Hammond) said he was in bad with Bradshaw, as he had promised Bradshaw the exclusive south side territory for selling ice and that they went over everything and "agreed to go ahead with the contract and pay weekly, as we always had." Plaintiff further testified that defendants then designated the plant in the south part of town as the place to get the ice, as it was more convenient for both parties than the north side plant. There was also evidence that during April and the first part of May, the plaintiff did pay weekly on statements furnished by defendants covering each past week. There were four such statements, the amounts increasing from $9.72 to $37.80. Plaintiff also testified that defendants' bookkeeper, when he was drawing up the contract providing for daily payments, expressed his opinion that defendants would not want or demand daily payments; but it is not claimed that defendants even knew of this. The defendants' evidence on this point is a denial of any subsequent talk or promise as to payment being made weekly instead of daily,

Digitized by Google

and that the defendants had plenty of ice in April and the first part of May, 1911, and were selling to everybody and, as plaintiff was an old customer, they paid no attention to the sales, amounts of ice he was getting or the manner of payment. All parties agree that the real ice season for retail trade opens up with warm weather in May or June, and plaintiff claims that he could during such season have handled fifteen to twenty tons per day, making his daily bills much larger than his previous weekly bills. On May 9th, the defendants referring to the previous letter of plaintiff's attorneys demanding a compliance with the contract to deliver ice to plaintiff, wrote plaintiff as follows: "We assure you that we shall fulfill our part of this agreement and hope you will comply with the same on your part. However, your failure to make payments and accept delivery as stipulated in contract will not be accepted by us. We hereby designate Hammond Bros.' ice plant at Eastern Junction as place of delivery and payment for ice furnished under this contract. And cannot agree to make delivery at any other place or accept payment otherwise than daily as per agreement. And after to-day we shall expect you to get your supply of ice from Hammond Bros.' ice plant and pay for same upon delivery." This letter marks the parting of the ways. No ice thereafter delivered and each party charges the other with a violation and repudiation of the contract; the defendants meaning the original contract and plaintiff meaning the modified contract. The plaintiff's instructions, following his petition, predicates his recovery on a finding that the defendants made a valid oral modification of the written contract, changing the time and terms of payment to weekly instead of daily payment. His present case must stand or fall on the validity of the modification.

There is no doubt that parties to a contract may waive for the time being a strict compliance with some of its terms without binding themselves to a continu-

Digitized by Google

ance of such waiver, and while not allowed to take advantage of the non-compliance already waived, or, perhaps, to return to a strict enforcement without notice, yet, such parties may on reasonable notice at least, either with or without valid reasons therefor, demand a strict compliance with the terms of the contract in the future. The defendants challenge the sufficiency of the evidence to show anything more than this and as not showing an intention to permanently change beyond the power of recall the terms of payment for ice yet to be delivered. We have serious doubts as to the evidence being sufficient to take this question of a change of the contract to the jury, but, waiving this, we are confronted with a proposition about which we have no doubts, to-wit, that the alleged modification is without consideration and therefore not binding.

It is evident that the claimed modification is wholly on defendants' part and in plaintiff's favor. The plaintiff's side of the contract was in no wise changed or modified; his obligation, so far as it was in defendants' favor, was the same before as after the change and he neither relinquished any right, assumed any new burden, made any new promise, or changed his situation with reference to the contract or its subject-matter. It is well settled in this State that the terms of a contract cannot be modified or changed or new conditions added thereto without a new consideration, any more than could the original contract be valid without an original consideration. This doctrine was asserted in Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 592, 15 S. W. 844, where it was held that when one who had already contracted to do work for a certain price and then exacted a modification of the contract agreeing to pay him a larger price for the same work on a refusal to carry out his first agreement, the modification was void for want of a consideration, the court remarking that, "Nothing we have said is intended as denying parties the right to modify their contracts,

Digitized by Google

or make new contracts, upon new or different considerations and binding themselves thereby." It should be noted, in answer to plaintiff's contention to the contrary, that in this case the modification was made when the contract was still executory and that the parties thereafter acted upon it. See also Wear Brothers v. Schmelzer, 92 Mo. App. 314, 322. In Macfarland v. Heim, 127 Mo. 327 333, 29 S. W. 1030, the court said: "Nothing is better settled in this State than that a subsequent agreement which does not form any part of an original contract, nor is supported by the original consideration thereof, nor by any new consideration, is a mere *nude pact*, of no force or validity. Such is the situation here. Williams 1. Williams 67 Mo. 662; McMahan v. Geiger, 73 Mo. 145, Montgomery Co. v. Auchley, 92 Mo. 126.]" In Patterson v. Insurance Co., 164 Mo. App. 157, 163, 148 S. W. 448, the plaintiff proved that while an insurance policy provided against the property being vacant, the defendant's agent afterward agreed that he would issue a vacancy permit whenever the house became vacant, and the court held this agreement void for want of a new consideration, saying: "Parties who make a contract have the power to modify it by a subsequent agreement, but there must be a sufficient consideration for the modification to give it contractual force." In Merrill v. Central Trust Co., 46 Mo. App. 236, 244, the court said: "And if said original contract was attempted to be rescinded, changed or modified in any way, it could only be accomplished by a new agreement supported by some new consideration." This same doctrine is announced in many cases, some of which, at least, will show that the attempted modification was made at a time when the contract was still executory. [Grath v. Roofing Tile Co., 121 Mo. App. 245, 249, 98 S. W. 812; Moomaw 1. Emerson, 80 Mo. App. 318, 322; Wilson & Son v. Russler & Gnagi, 91 Mo. App. 275, 281.] Such is the weight of authority. [3 Elliott on Contracts, sec. 1989.]

Digitized by Google

As to what is a consideration for a contract, whether original or a modification, the court said in Scriba v. Neely, 130 Mo. App. 258, 109 S. W. 845: "In bilateral contracts the promise of each one of the parties is a sufficient consideration for the promise of another. . . . Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the act or promise for the first. It does not matter whether the party accepting the consideration has any actual benefit thereby or not—it is enough that he accepts it and that the party giving it does thereby undertake some burden or lose something which in contemplation of law may be of value." In German v. Gilbert, 83 Mo. App. 411, 416, the rule is stated thus: "That in order to support an action the promise must have been made upon legal consideration moving from the promisee to the promisor; there must be either a benefit to the maker of the promise or the waiver of some legal right, a loss, trouble or inconvenience to, or a charge or obligation resting upon the party to whom the promise is made." While one promise is a consideration for another, and such is the usual consideration for executory contracts, yet, there must always be mutuality as to such promises to make such contracts valid and this applies to a modification of a contract the same as to the original.

Plaintiff cites and relies on a number of cases where it is stated generally that the annulling of a previous contract or substitution of a new one for it, or the acting on the new contract as modified, are each a sufficient consideration to support the new or modified agreement. 'We think there will be found no connict between such cases and the ones we have above cited, but that the "cancelling," or "substitution," or "acting" must apply to both parties or affect the contract with reference to both. [Welch v. Mischke, 154 Mo.

Digitized by Google

App. 728, 734, 139 S. W. 36; Scriba v. Neely, 130 Mo. App. 258, 261, 109 S. W. 845.] In a case very similar to this one, Zerr v. Klug, 121 Mo. App. 286, 292, 98 S. W. 822, the court held that where a contract for the sale of goods to be paid for on delivery was so modified by subsequent agreements as to be payable by a note to be given at a later time, the modification was purely one-sided and without consideration. What the court there said is applicable to this case with a mere change of names. "Klug parted with nothing and appellant received nothing as an inducement to substitute for the original agreement a new one postponing the maturity of the debt to a certain time and then take a note for it. Though Zerr agreed to wait for such a note, the memorandum does not show Klug bound himself to give one; though, no doubt, Zerr's agreement to wait longer for his money would have been enough to support the substituted agreement as against Klug. But what was there to uphold it against Zerr? What did he get or Klug lose? In another case, where the facts are essentially the same as this one, Warren v. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644, one party undertook to prove a verbal modification of an unperformed contract for the sale of old iron so as to change the time for making payment and the court held such new agreement was both without consideration and within the statute of frauds. That case has been approved many times. [See Ives v. Kimlin, 140 Mo. App. 293, 124 S. W. 23; Moots v. Cope, 147 Mo. App. 76, 85, 126 S. W. 184; Reigart v. Coal & Coke Co., 217 Mo. 142, 166, 177 S. W. 61.] This last point, however, has not been raised in the present case. It results that plaintiff cannot recover upon the modified contract and the present judgment cannot stand.

There is some evidence, both direct and circumstantial, that defendants refused to comply with their original contract. It may be that, on an amended petition, a breach of the original contract may be estab-

Digitized by Google

lished and we will reverse and remand the case. In view of a possible new trial, it is proper to say that much is said in the course or argument as to defendants' lack of good faith in insisting on a strict compliance with the contract, in that such strict compliance imposed hardships on both parties, both in requiring daily payment and in designating an unnecessarily inconvenient place to deliver the ice. These are matters that should have been guarded against in making the contract and it is obvious that defendants' motives for requiring a strict compliance with the contract are immaterial in law on the question of defeating his right to do so. Such evidence, however, might have a bearing on the question of whether the defendants were merely requiring a strict compliance with the contract or were intentionally evading and violating it themselves. It might also have a bearing on the question of whether defendants' refusal to deliver ice on one or more particular occasions uner the strict terms of the contract, should this be proven, was unavoidable and excusable or could be taken by plaintiff as showing a fixed purpose on defendants' part not to furnish ice even on a strict compliance with the contract by plaintiff and making further efforts to get ice useless.

We might also say that the court erred in permitting plaintiff to read in evidence parts of defendants' application for a continuance of the case. When, in order to avoid a continuance of a case, the evidence of an absent witness as set forth in such application is admitted as and for his evidence, it is not proper to inquire during the trial as to the diligence used to have the witness present nor as to the motive of the party using the evidence in not having the witness there or of the witness in not attending. Such matters are not material. [Osborn v. Emery, 51 Mo. App. 408; Thiele v. Railroad, 140 Mo. 319, 41 S. W. 800.] It is true the plaintiff was entitled to ask defendant on cross-exam-

Digitized by Google

ination if the absent witness was in their employ, as showing the witness's interest in the case, but when the defendant answered in the affirmative and incidentally stated the place of his employment there was no need to show that in the application for continuance the defendant swore that the whereabouts of the witness was *then* unknown. This was not material and was merely prejudicial.

We will not discuss the measure of damages, as the same facts may not be presented again, further than to say that, if it was not possible or practicable to buy ice on the market, either in Springfield or to be delivered there for plaintiff's use, on such terms as to lessen the damages claimed, then the measure of damages could not be the difference between the market price in Springfield and the contract price but would be the loss of profits under proof of the proper facts as to the certainty of such loss. [Gildersleeve v. Overstolz, 90 Mo. App. 518; Shouse v. Neiswaanger, 18 Mo. App. 236; Wilson & Son v. Russler & Gnagi, 91 Mo. App. 275; Morrow v. Railroad, 140 Mo. App. 200, 123 S. W. 1034; Holloway & Bro. v. White-Dunham Shoe Co., 151 Fed. 216.] Other alleged errors need not be mentioned, as they will not likely recur. For the errors above mentioned, the case will be reversed and remanded.

Robertson, P. J., concurs. *Farrington, J.*, concurs.

Digitized by Google

F. CONKLIN, by his next friend, L. S. DEWEY, Respondent, v. AMERICAN ZINC, LEAD AND SMELTING COMPANY, Appellant.

Springfield Court of Appeals, April 23, 1914.

Affirmance on stipulation, respondent entering *remittitur*.

Affirmance on stipulation, respondent entering remittitur.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. David E. Blair,* Judge.

AFFIRMED.

Thomas & Hackney for appellant.

Walden & Andrews for respondent.

PER CURIAM.—Action by F. Conklin, a minor, by L. S. Dewey, his next friend, against the American Zinc, Lead & Smelting Company. Judgment for plaintiff for $1050 and defendant appeals.

Appellant and respondent, by their respective attorneys, have filed in this cause a stipulation whereby respondent enters a remittitur of $350 of said judgment, together with all accrued interest on said judgment from the date of its rendition to the date the stipulation was executed (March 13, 1914), and agrees that this court shall affirm the judgment in this cause for the sum of $700. It is accordingly so ordered.

Digitized by Google

ADDIE CORNELL, Appellant, v. MUTUAL LIFE INSURANCE COMPANY, OF NEW YORK, Respondent.

Springfield Court of Appeals, April 23, 1914.

1. **APPELLATE PRACTICE: Trial Court's Discretion as to New Trial.** It is largely discretionary with the trial court whether or not it will grant a new trial on the ground that the verdict i against the weight of the evidence; and only when such discretion has been clearly abused should it be interfered with.

2. **———: New Trial: Verdict Against Weight of Evidence: Elements Necessary to Conclusion.** On a motion for a new trial on the ground that there is no evidence to support the verdict, to sustain such verdict it is necessary that the evidence should not be contrary to physical fact or so impossible or improbable as to be unbelievable and it must be substantial and possess some probative force when taken in connection with all the facts and circumstances; but all reasonable inferences to be drawn from the facts proven, stand for evidence.

3. **———: ———: ———: Trial Court's Discretion.** That a trial court in weighing the evidence for and against the verdict concludes that the evidence for the verdict is so light as to be of no consequences were there no evidence contradictory, does not prevent that court from also finding that the opposing evidence outweighs it and warrants setting aside the verdict on the ground that the evidence does not support it.

4. **NEW TRIAL: Verdict Against Weight of Evidence: Review.** In an action on an insurance policy, the evidence is reviewed and the granting of a new trial by the trial court on the ground that the verdict was against the weight of evidence is sustained.

5. **———: Evidence Insufficient: Evidence Absent.** On a motion for a new trial, where more than one issue was involved in a single defense, the court may find that there was no evidence to support the verdict on one issue and that the finding on the other was against the weight of the evidence.

6. **LIFE INSURANCE: Policy Contract: Beneficiary's Rights Under.** While a life insurance policy, where there is no special provision to the contrary, confers a vested right upon the beneficiary which cannot be impaired without the beneficiary's consent by any act of the assured in surrendering, assigning

Digitized by Google

or pledging same, yet a valid right of the insured to surrender the policy for cash without the consent of the beneficiary may be made a part of the policy contract.

7. ———: **Wife's Right as Beneficiary: Statutory Provisions.** Sec. 6944, R. S. 1909, gives no additional rights to a wife as beneficiary under a life insurance policy, but merely protects her under and subject to the provisions of such policy.

8. ———: **Assigning or Pledging Policy: Foreclosure and Enforcement.** Where the insured assigned or pledged a life insurance policy in conformity with a provision therefor in the policy, no subsequent ratification or authorization was necessary to enable the assignee or pledgee to foreclose the pledge and enforce the assignment in payment of the secured debt.

9. ———: ———: **Contingent Interests.** Though the insured's right to surrender a 20 year life insurance policy for cash is contingent before the expiration of the 20 year period, yet an assignment thereof before such time is valid.

10. ———: ———: **Formality.** Where a life insurance policy was pledged pursuant to a provision therein contained, a written assignment was not necessary, but the mere deposit of the policy as collateral security and its retention by the pledgee with the consent of the pledgor for an existing debt, was sufficient to give the pledgee all the rights of an assignee for the same purpose.

11. ———: **Assignment of Policy: Evidence.** Action on a life insurance policy, which the company claimed had been pledged and assigned to another as collateral security and cashed by the pledgee. Evidence examined and *held* not sufficient to sustain a finding that the insured did not make a written assignment of the policy.

Appeal from Jasper County Circuit Court, Division Number One.—*Hon. Joseph D. Perkins,* Judge.

AFFIRMED.

R. A. Mooneyham for appellant.

(1) When an issue of fact is *controverted,* and oral testimony must be relied on to show the fact, the jury has the right to find against the testimony although it is uncontradicted. First State Bank v.

Digitized by Google

Hommon, 124 Mo. App. 177; Hunter v. Wethington, 205 Mo. 284. In old line insurance the issuance of a policy immediately confers a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which no act of the insured can impair without the beneficiary's consent. Blomb v. N. Y. Life Ins. Co., 197 Mo. 513; Casualty Co. v. Kaser, 169 Mo. 313; 3 Am. & Eng. Ency. of Law (2 Ed.) p. 980; Packard v. Conn. Mut. Life Ins. Co., 9 Mo. App. 469. Even though the policy expressly confers upon the insured the option of surrendering it after a certain period, still this could not be done as against the rights of the wife and children. Timayeris v. Union Mutual Life Ins. Co., 21 Fed. 223; Putnam v. N. Y. Life Ins. Co., 42 La. 739; Pilcher v. N. Y. Life Ins. Co., 33 La. 322; Ricker v. Charter Oak Life Ins Co., 27 Minn. 183; Whitehead v. N. Y. Life Ins. Co., 102 N. Y. 143; Central Bank v. Humes, 128 N. S. 195. The beneficiary can recover on a life insurance policy notwithstanding the insured obtained loans on the policy from the insurer and then surrendered it to the insurer and obtained from it the cash surrender value thereof. Mutual Benefit Life Ins. Co. v. Willoughby, 54 South. 834; Smith v. Mutual Benefit Life Ins. Co., 173 Mo. 329.

McReynolds & Halliburton, New & Krauthoff and *P. E. Reeder* for respondent.

(1) Appellant did not make out a prima-facie case at the trial below. Garr-Scott & Co. v. Nelson, 166 Mo. App. 51; Nichols v. Thoadman, 112 Mo. App. 299; Jasper v. Bank, 130 Mo. App. 635; Camlin v. Schinlanberger, 64 Mo. App. 548; Nichols v. Larkin, 39 Mo. 264. All of the evidence in this case disclosed conclusively that appellant had no right of action whatsoever on the policy in question at the time suit was instituted, and that the contingent interest acquired by

Digitized by Google

her in the policy when it was issued was cut off when the Golden City Banking Company surrendered the policy for its cash value in September, 1910. Webb v. Insurance Co., 134 Mo. App. 576, 579; Leeker v. Insurance Co., 154 Mo. App. 440. Eagle v. Life Insurance Co,. 91 N. E. (Ind.) 814; Fenn v. Insurance Co., 48 La. Ann., 541; Levy v. Van Hagen, 69 Ala., 17; Mutual Life Ins. Co. v. Twyman, 92 S. W. (Ky.) 335; Pierce v. Insurance Co., 138 Mass. 160. It is the general rule that where a special reservation is made in the policy providing that an insured has the right, subject to the consent of the insurer, to change the beneficiary, that the beneficiary's rights are contingent upon this reservation in favor of the insured. Hopkins v. Insurance Co., 99 Fed. 199; Lamb v. Insurance Co., 106 Fed., 637; Denver Insurance Co. v. Crane, 73 Pac., 875. The trial court properly set aside the verdict because it was against the weight of the evidence, and his action was right also because he should have instructed the jury for the respondent because under the facts in this case only one reasonable inference could be drawn therefrom, consequently the decision became a question of law for the court, and the court should have peremptorily instructed the jury for respondent. Powell v. Missouri Pacific, 76 Mo. 84; Furber v. K. C. Bolt & Nut Co., 185 Mo. 301; Jackson v. Hardin, 83 Mo. 175; Kropp v. Brewing Co., 138 Mo. App. 49; McCreery v. Railroad Co., 221 Mo. 18; Link v. Hathaway, 143 Mo. App. 509.

STURGIS, J.—This is a suit by the widow of C. A. Cornell to collect the amount of a policy of insurance on his life. The policy was issued August 2, 1889, and provides that it becomes a paid-up policy after payment of premiums for twenty years. The insuance of the policy, the payment of all the premiums, the death of the assured, and that plaintiff is his widow and named in the policy as beneficiary, are all admit-

Digitized by Google

ted. Among the provisions of the policy are these: "Surrender. This policy may be surrendered to the Company at the end of the said first period of twenty years, and the full reserve computed by the American Table of Mortality and four per cent interest, and the surplus as defined above, will be paid therefor in cash. . . . The interest of the beneficiary in this policy is subject to the right of the insured to surrender this policy for its cash value at the expiration of 20 years from its date." This last clause was not in the regular printed form but was inserted in the policy as a special provision. The defense of the company is that the policy was assigned and pledged by the assured and beneficiary in July, 1904 (prior to the time the right of the assured to surrender same accrued), to a bank at Golden City, Missouri, to secure an indebtedness of the assured to such bank and that said bank, as the lawful holder of same, surrendered the policy to defendant for its cash value, paid to said bank on September 10, 1910, which was after the lapse of such twenty year period. The plaintiff by reply denied both the fact and validity of this assignment.

The evidence shows that C. A. Cornell, the assured, became indebted to this bank prior to July, 1904, and had deposited the policy with the bank as collateral security but without any written assignment of same. Defendant's evidence shows that at this time the bank desired a formal assignment of same in writing as security for this indebtedness and that a letter, prepared by the bank and signed by the assured, was forwarded to defendant, requesting a blank form of assignment; that defendant furnished this blank form and thereafter the same was delivered to the bank, properly filled out and purporting to be signed by the assured and beneficiary, plaintiff herein; that the note evidencing the indebtedness of the assured to the bank was renewed from time to time, until, in September, 1910, the bank informed the assured that the note must be

Digitized by Google

paid and unless otherwise provided for it would be compelled to surrender or cash in the policy at its cash value; that the assured, not being able to pay otherwise, assented to its doing so; that the policy was so surrendered for its cash value, which was applied on but was not sufficient to discharge the debt of the assured to the bank. The plaintiff testified, with some corroboration, that she had never sigend or assented to the written assignment of the policy to the bank. That became a question for the jury and was found in plaintiff's favor. The plaintiff admitted, however, that she knew the bank was holding the policy and says that when she last knew of it the bank had it. The plaintiff also claims that there is sufficient evidence to warrant the jury in finding that the insured, C. A. Cornell, did not execute the written assignment to the bank, claiming that both signatures thereto were forged.

At the close of the evidence, which related mostly to the genuineness of the signatures to the written assignment, the court refused to direct a verdict for the defendant but in effect instructed the jury to find for plaintiff, unless the jury found: "(1) that the plaintiff made an assignment of said policy to the Golden City Banking Company or consented to such assignment of said policy, or (2) that the said Charles A. Cornell did, before the expiration of the 20 year period assign said policy to the Golden City Banking Company and that after the expiration of the said twenty year period, and before his death, he authorized said bank to surrender said policy to the defendant company and take the cash surrender value thereof, and unless you so believe and find, your verdict must be for the plaintiff." The court further instructed the jury that the burden of proof was on defendant to establish these defenses or one of them. The court, however, refused to instruct the jury for defendant on the converse of these defenses, to-wit, that if the jury

Digitized by Google

found that C. A. Cornell, prior to the expiration of the 20 year period, assigned the policy to the bank as security of his indebtedness, then the bank, after such period, had a right to surrender same for its cash value, without reference to the element of his authorizing the bank to do so after such 20 year period; also, that if the assured, C. A. Cornell, pledged the policy to the bank for his indebtedness before the 20 year period, then his authorizing the bank to surrender same for its cash value after such period would be a defense. The jury found for the plaintiff. The court thereupon sustained defendant's motion for a new trial, assigning as reasons therefor: "that the verdict of the jury is against the greater weight of evidence, and for the further reason that the court erred in refusing the defendant's instruction numbered one, directing a verdict for the defendant." I. The action of the trial court in granting a new trial because the verdict is against the weight of the evidence rests largely in the discretion of that court and should only be interfered with when it is clear that discretion has been abused. [Terpenning v. Nicholls, 140 Mo. App. 505, 519, 120 S. W. 688; Van Hoose v. Machinery Co., 169 Mo. App. 54, 154 S. W. 165.] It is suggested, however, that, as the trial court granted the new trial for failure to sustain a demurrer to the evidence, this is equivalent to ruling that there is *no* evidence to sustain the verdict and that the court could not rule that there is a total lack of evidence to support the verdict and at the same time weigh the evidence to determine whether the verdict is with or against such weight. Such seems to be the ruling in Crawford v. Stock Yards Co., 215 Mo. 394, 114 S. W. 1057, as interpreted by this court in Richter v. Railroad, 145 Mo. App. 1, 7, 129 S. W. 1055, and is equivalent to ruling that a trial court cannot sustain a motion for new trial on the two grounds that there is no evidence to support the verdict and that the verdict is against the weight of the

Digitized by Google

evidence, as the first reason destroys the last. The reason given is that a court cannot say in one breath that there is no evidence at all on one side and in the next breath that it has weighed it and found the preponderance against the verdict. It seems to us, however, that this reasoning, is not altogether logical as applied to the real attitude of the trial court in determining and assigning such reasons for granting a new trial. It is often a difficult matter to determine whether there is any evidence to sustain a verdict or not. In the first place, in determining such question, the evidence must be believable, that is, not contrary to physical facts or so improbable as to stagger human credulity, and must be substantial and have some probative force when taken in connection with all the facts and circumstances. [Furber v. Bolt & Nut Co., 185 Mo. 301, 84 S. W. 890; Schaub v. Railroad, 133 Mo. App. 444, 448, 113 S. W. 1163; Strauss v. Chewing Gum Co., 134 Mo. App. 110, 114, 114 S. W. 73.] On the other hand, all reasonable inferences to be drawn from the facts proved stand for evidence. It so happens that legal minds differ as to whether there is or is not any believable evidence having some weight on the side of the verdict. Now, suppose a trial judge in weighing the evidence comes to the conclusion that what is urged as evidence sufficient to support a verdict is so equivocal or unbelievable or has so little probative force as in his judgment not to constitute sufficient evidence to sustain a verdict, but realizing that he may be mistaken and that another court or judge may hold that these matters and things do constitute sufficient evidence to take the case to a jury, he then weighs the same on that theory and has no hesitation in holding that such evidence, if sufficient to be considered evidence at all, is far outweighed by the positive, credible and abaundant evidence on the other side. The fact that in weighing the evidence for and against the verdict, the trial court concludes that the

Digitized by Google

evidence for same is so light and vapory as to be insufficient to tip the scale beam, were there no evidence on the other side, does not to my mind prevent the court from also finding that in any event the opposite evidence far outweighs it. Such was the ruling of the Supreme Court in Gould v. St. John, 207 Mo. 619, 631, 106 S. W. 23, and we do not think the court intended to overrule this case in Crawford v. Stock Yards Co., supra. It is true that when the trial court determines and assigns one valid ground for granting a new trial, it is in a sense useless and irrelevant to go further and determine and assign a further ground and in doing so he rather assumes that the first one may not be valid. No court has held, however, that only one gorund for granting a new trial should be assigned.

But in this case there is more than one issue involved in a single defense, and the court may well have found that there was no evidence to support the verdict on one issue and that the finding on the other was against the weight of the evidence. The second defense submitted by plaintiff's instruction required the jury to find for defendant: (1) That the assured assigned the policy to the bank before his right to surrender same for cash matured; and (2) that after such right matured he authorized the bank to so surrender it. The jury in finding for plaintiff found both these facts against defendant, and the trial court may have concluded that there was no evidence for plaintiff but that it was all for defendant as to the latter fact, and was strongly against plaintiff on the other fact. Suppose then the jury, in arriving at their verdict, found that the assured did execute the assignment but did not afterward authorize the surrender. The opinion of the trial court would then be that the verdict was without any evidence to support it. But, if the jury in finding for plaintiff found that the assured did not execute the assignment but did authorize the surrender, then the opinion of the trial court would be

Digitized by Google

that the verdict was merely against the weight of the evidence. We will have to rule, therefore, that in this case the trial court properly granted a new trial because the verdict was against the weight of the evidence.

II. The next point to determine is whether the law as applied to the conceded facts of the case precludes plaintiff's recovery and a judgment must be directed for the defendant. Attending then to the defenses set up in this case, we hold that, while it is true, as contended by plaintiff, that an ordinary insurance policy, absent any special provision to the contrary, confers a vested right in the beneficiary which no act of the insured in surrendering same or in assigning or pledging it can impair without the consent of the beneficiary (3 Ency. of Law (2 Ed.), 984, 984; Blum v. Insurance Co., 197 Mo. 513, 95 S. W. 317, and cases cited; U. S. Casualty Co. v. Kacer, 169 Mo. 301, 313, 69 S. W. 370), yet, we think that it is equally clear, and is so recognized in the above authorities and others cited by plaintiff (Lockwood v. Insurance Co. (Mich.), 66 N. W. 229; New York Life Ins. Co. v. Ireland (Tex.), 17 S. W. 617), that a valid right of the insured to surrender the policy for cash, or other similar provision, either absolutely or after a certain period or event, without the consent of the beneficiary, may be made a part of the policy contract. Section 6944, Revised Statutes 1909, does not interfere with this rule but merely protects the wife under and subject to the provisions of the policy. [Webb v. Insurance Co., 134 Mo. App. 576, 579, 115 S. W. 481; Leeker v. Insurance Co., 154 Mo. App. 440, 451, 134 S. W. 676; Eves v. Woodmen of the World, 153 Mo. App. 247, 256, 133 S. W. 657; Mutual Life Ins. Co. v. Twyman (Ky.), 92 S. W. 335; Eagle v. Insurance Co. (Ind.), 91 N. E. 814; Pierce v. Insurance Co., 138 Mass. 151, 160.] This principle goes to the extent that the assured may reserve the right to change, and thus cut

Digitized by Google

off every right of, the beneficiary without the latter's consent. [Robinson v. Insurance Co., 168 Mo. App. 259, 153 S. W. 534; Hopkins v. Insurance Co., 99 Fed. 199; Lamb v. Insurance Co., 106 Fed. 637; Denver Ins. Co. v. Crane (Colo.), 73 Pac. 875.] This theory of law seems to have been adopted at the trial by plaintiff, as shown by her instruction numbered one above mentioned, and plaintiff is bound by such theory though she argues the contrary here.

The policy contains a provision relating to its assignment and recognizes the right to do so. To make the assignment valid as against the company, the same must be in writing and a copy filed with it but that is for the company's benefit only. It would follow, therefore, as a legal consequence, that the assured could, without the consent of the beneficiary and whether she joined in the assignment or not, make a valid assignment or pledge of the policy, at least after the assured's right to surrender it for cash matured, and the exercise of such right conferred on the holder or pledgee the power to realize on the same in a lawful manner. Having once assigned or pledged the policy as collateral security, the same could not be revoked and it would take no subsequent ratification or authorization to enable the assignee or pledgee to foreclose the pledge in payment of the secured debt. [Travelers' Ins. Co. v. Healy, 49 N. Y. Supp. 29, affirmed in 164 N. Y. 607; Mutual Life Ins. Co. v. Twyman (Ky.), supra.]

Plaintiff insists, however, that while the insured's right to surrender the policy for cash was contingent only, as it was before the twenty year period had elapsed, he had then nothing to assign and his attempted assignment to the bank was invalid. The New York case, just cited, is against this contention. So is Hubbard v. Stapp, 32 Ill. App. 541, 546-7. "A sale, assignment or mortgage for a valuable consideration of chattels or other personal property to be acquired at a future time operates as an equitable assignment

Digitized by Google

and vests the equitable ownership of the articles in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor without any further act on the part of either, and this ownership a court of equity will protect and maintain at the suit of the equitable assignee." [3 Pom. 2576.] "And so it has been held that courts of equity will support assignments not only of choses in action but contingent interests and expectations, and also things which have no present actual or pretended existence, but rest in mere possibility only. [Bacon v. Bonham, 6 Stew. 616; Smithurst v. Edmunds, 1 McCart. 416; Langton v. Horton, 1 Hare, 549; Robinson v. McDonnell, 5 M. & S. 228; Apperson v. Moore, 30 Ark. 56; Edwards v. Peterson, 80 Me. 367; Hax v. Acme Plaster Co., 82 Mo. App. 447, 455. See, also, Price v. Mining Co., 83 Mo. App. 470, 475; Swinney v. Gouty, 83 Mo. App. 549; 31 Cyc. 793; Godman v. Simmons, 113 Mo. 122, 120, 20 S W. 972; 4 Cyc. 14; Goldstein v. Hort, 30 Cal. 372.]"

We think it is also the law that it is not necessary that there be an assignment of the policy in writing but that the mere deposit of the policy as collateral security and its retention by the pledgee with the consent of the pledgor as security for an existing debt gives the pledgee the rights of an assignee for the same purpose and would and did in this case give the bank authorities, after the pledgor's right matured and the debt remaining unpaid, to surrender the policy for its full cash value and apply same on such debt. In Ellis v. Kreutzinger, 27 Mo. 311, the syllabus correctly states the law thus: "The deposit of a policy of insurance with a creditor of the assured as a security for the debt gives such creditor a lien upon the proceeds of the policy, a lien binding upon the assured, the insurer and upon all who, with notice of such lien, take an interest in the policy from the assured." In Key v. Insurance Co., 101 Mo. App. 334, 351, 74 S. W. 162, the court said: "The effect of the deposit of the policy with

Digitized by Google

Heaton along with the transfer of Fugitt's note, was to give Heaton an equitable lien on the proceeds in case of loss, equal to the amount of the mortgage debt. [Ellis v. Kreutzinger, supra; Cromwell v. Ins. Co., 44 N. Y. 42; Leinkauf v. Calman, 110 N. Y. 50; Wakefield v. Martin, 3 Mass. 558." See, also, Bidwell v. St. Louis Dock & Ins. Co., 40 Mo. 42, 46.]

There is no question but that the bank received and held the policy as a pledge, if not by formal assignment, of the insured as collateral security for a debt of the insured. We would also hold, if necessary to a decision in this case, that plaintiff's evidence on cross-examination, declaring to say that the otherwise abundantly proved signature of her husband to the written assignment was in fact his but that she now thought it doubtful, although acknowledging that on a former trial she had testified positively that it is his signature, is no more than a failure on defendant's part to prove the signature by her and is not sufficient evidence to sustain a finding that the husband did not sign it. The defendant's evidence, that the insured directly consented to the bank's surrendering the policy for its cash value after his right to do so matured, stands uncontradicted. No question is raised but that the policy was surrendered at such time for its full cash value and it is conceded that the amount received was not sufficient to discharge the insured's indebtedness to the bank. This is a completed transaction so far as the rights of the insured, the bank and the defendant company are concerned and it makes no difference whether their rights under the assignment or pledge were legal or equitable—a question discussed in some of the cases referred to.

We hold, therefore, that the insured had a contingent interest in the policy, which matured at the end of twenty years and which could be assigned or pledged without the consent of the beneficiary; that plaintiff's execution of the written assignment or consent to the

Digitized by Google

pledge of the policy was not essential, as the bank derived no interest or right from her; that the execution of the formal assignment by the insured was not essential, but that he could and did deliver and pledge his interest in the policy to the bank as collateral security for his indebtedness to it and that the bank held the same, subject to having its rights defeated in case the insured died before the twenty year period elapsed; that after such period the bank, as pledgee or assignee, could without, and did with, the assent of the insured, in order to pay the secured indebtedness, exercise the right conferred by the policy and surrendered the policy for its cash value; that plaintiff thereby lost all her rights and interest in the policy sued on.

The trial court should, therefore, have directed a verdict for defendant. The order of the trial court setting aside the verdict and granting a new trial will be affirmed.

Robertson, P. J., concurs in the result. *Farrington, J.*, concurs.

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1913.

In the Matter of the Estate of GEORGE W. FRITCH, Deceased; ELIZABETH FRITCH, Administratrix, Respondent, v. LETITIA L. FRITCH, Intervening Creditor, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **EXECUTORS AND ADMINISTRATORS: Allowance to Widow in Lieu of Provisions: Ex Parte Proceedings.** An award to a widow of money in lieu of a year's provisions, under Secs. 114 and 115, R. S. 1909, may be made ex parte, and, in case the widow is administering the estate, without the appointment of an administrator *ad litem* and without notice to creditors or others interested in the estate, since the year's provisions, as well as an award in lieu thereof, is the widow's absolute property, and in no sense a demand against the estate.

2. ———: ———: **Amendment of Order of Allowance After Term.** The action of the probate court in allowing a widow a sum of money in lieu of a year's provisions, as authorized by Sec. 115, R. S. 1909, is a final judgment, and hence such allowance cannot be modified by the probate court at a subsequent term.

3. ———: ———: **Vacation of Order: Statute.** Sec. 220, R. S. 1909, authorizing probate courts to vacate an order allowing a demand against an estate within four months after the allowance thereof, is inapplicable to the allowance of a sum of money in lieu of a year's provisions, as provided for in Sec. 115, R. S. 1909.

Digitized by Google

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

AFFIRMED.

Rassieur, Kammerer & Rassieur for appellant.

(1) In presenting and prosecuting against the estate an application for an appropriation, and at the same time assuming to represent the estate as administratrix, respondent occupied inconsistent positions, and attempted to represent adverse interests; the action of the probate court on her application was therefore neither final nor conclusive on the creditors. State ex rel. Miller v. Bidlingmaier, 26 Mo. 483, 485; State ex rel, Mueller v. Reinhardt, 31 Mo. 95; Clark v. Crosswhite, 28 Mo. App. 34; Freeman, Admr., v. Probate Judge, 79 Mich. 390; Heck v. Heck, 34 O. St., 369; In re Hutton's Est., 92 Mo. App. 132. (2) The administratrix was a statutory trustee of the estate, for the benefit of the creditors, and she was therefore bound to protect their interests, and could not assume to act for and against the estate at the same time. Desloge v. Tucker, 196 Mo. 587; Perkins v. Goddin, 111 Mo. App. 429; In re Est. of Horner, 66 Mo. App. 531; Orr v. Sanford, 74 Mo. App. 187; 2 Woerner, Admin. (2 Ed.), Sec. 334. (3) The action of the probate court upon the application of the widow-administratrix was the same as any other allowance made to an administrator during administration, and was open to review at any time during the administration and upon final settlement of the estate. In re Hutton's Est., 92 Mo. App. 132; Picot v. Biddle's Admr., 35 Mo. 29; 44; Kidd v. Guibar, 63 Mo. 342; North v. Priest, 81 Mo. 561; State ex rel. Scott 1. Greer, 101 Mo. App. 669. (4) The application having been made by the widow-administratrix, it cannot be deemed to have been made by the widow individually without re-

Digitized by Google

gard to her office of administratrix, and as such the representative of the heirs and creditors, for to do so would foreclose the rights of those interested in the estate, without notice and without an opportunity for redress. State ex rel. Miller v. Bidlingmaier, 26 Mo. 483; Clark v. Crosswhite, 28 Mo. App. 34; In re Hutton's Est., 92 Mo. App. 132. (5) The widow-administratrix having assumed to act for adverse interests, the appropriation obtained as a result of her inconsistent conduct, was voidable, and subject to review at any time during administration, at the instance of any creditor or other party in interest. State ex rel. Miller v. Bidlingmaier, 26 Mo. 483; Clark v. Crosswhite, 28 Mo. App. 34; In re Hutton's Est., 92 Mo. App. 132; Freeman, Admr., v. Probate Judge, 79 Mich. 390. (6) The order of the probate court making the appropriation cannot properly be termed a judgment, as there was but one party before the court. It was the same as if a disinterested party had been administrator, and the court had acted on the widow's application, without notice to the administrator; in such a case, it is clear that the action of the court would be voidable, if not wholly void. State ex rel. Deems v. Holtcamp, 245 Mo. 655; Freeman, Admr., v. Probate Judge, 79 Mich. 390; Heck v. Heck, 34 O. St. 369; In re Hutton's Est., 92 Mo. 132. (7) (A) To constitute a valid judgment, the court must have jurisdiction of the parties, and each party to the action or matter in controversy must have an opportunity to be heard. Golahar v. Gates, 20 Mo. 236; Roach v. Burnes, 33 Mo. 319; Anderson v. Brown, 9 Mo. 638. (B) And where property rights of the parties are to be affected, the law will imply that notice was intended, even though the statute does not in terms require notice to be given. State er rel. Deems v. Holtcamp, 245 Mo. 655; State ex rel. Reid v. Walbridge, 119 Mo. 383; Brown v. Weatherby, 71 Mo. 152; Wickham v. Page, 49 Mo. 526.

Digitized by Google

Karl M. Vetsburg and Charles H. Franck for respondent.

(1) The order of January 9, 1911, making the allowance in favor of the widow is a judgment which became final when no appeal was taken therefrom according to law. Campbell v. Whitsett, 66 Mo. App. 444; R. S. Mo. 1909, Sections 289-290. (2) Probate courts have no equity jurisdiction. Their powers are fixed by statute and they cannot revoke a former decree and pass another for a less sum. Glover's Estate, 127 Mo. 153; Elliot's Estate, 27 Mo. App. 218; Woerner on American Law of Administration, (2 Ed.) Vol. 1, Page 205, Section 93; Pettee v. Wilmarth, 5 Allen 144; In re Stevens, 83 Cal. 322. (3) The laws of this State do not provide for or require notice to creditors of an application for an allowance to the widow in lieu of provisions. R. S. Mo. 1909, Sections 114, 115. (4) The laws of this State do not authorize or require the appointment of an administrator *ad litem* to represent the estate in the matter of a widow's allowance, where the widow is also administratrix. R. S. Mo. 1909, Sections 211, 289. (5) An allowance in lieu of provisions is not a demand within the meaning of Section 211, R. S. Mo. 1909. R. S. Mo. 1909, Section 289; Campbell v. Whitsett, 66 Mo. App. 444. (6) Even though the allowance be construed as a demand, appellant has no standing, because she has not attacked its allowance in the manner provided by law. R. S. Mo. 1909, Section 220.

ALLEN, J.—This is an appeal from a judgment of the circuit court of the city of St. Louis, reversing and setting aside a certain order of the probate court of said city.

The respondent, Elizabeth Fritch, is the widow of George W. Fritch, deceased, and is the administratrix of the estate of her husband. On January 9, 1911, at

Digitized by Google

the December term 1910, of said probate court, and while the estate was in process of administration therein, respondent, as the said widow of the deceased, made application to the court for an allowance to her in lieu of provisions, out of the funds on hand in said estate, under the provisions of sections 114 and 115 of the Revised Statutes of 1909.

Acting upon said application the probate court did, on the same day, enter an order appropriating to respondent the sum of six hundred dollars, in lieu of the grain, meat, vegetables, groceries and other provisions mentioned in section 114, supra, necessary for the subsistence of the widow for twelve months, and which were not on hand at the time of taking the inventory.

Thereafter, to-wit, on June 16, 1911, and at the June term, 1911, of said probate court, the appellant, Letitia L. Fritch, a creditor of said estate, filed a motion in the probate court praying for an order reducing the said allowance to respondent from six hundred dollars to two hundred dollars, upon the ground that the allowance made was excessive, that the estate was insolvent, and that respondent, as widow, had received her "absolute dower" of four hundred dollars, and her dower in the real estate, and should be satisfied with the amount of two hundred dollars, as an allowance in lieu of provisions.

Thereafter, on July 10, 1911, and at the same June term of said probate court, the latter made and entered an order reducing said allowance to respondent from six hundred dollars to the sum of three hundred dollars.

Thereupon the respondent appealed therefrom to the circuit court, and upon a trial there *de novo,* the latter court by its judgment vacated and set aside said order of the probate court of July 10, 1911; from which judgment Letitia L. Fritch, the intervening creditor, prosecutes this appeal.

Digitized by Google

The only question involved is whether the probate court had jurisdiction at a subsequent term to reduce the allowance originally made to the respondent as the widow of the deceased.

Appellant contends that the original order, made at the December term, 1910, of the probate court, was void, or at least voidable, for the reason that it was made *ex parte,* without either the appointment of an administrator *ad litem,* or notice to creditors or others interested in the estate; and that in any event it was not a final judgment, but was subject to review and correction at any time during the course of administration, prior to the final settlement of the estate.

It will be well, in the first place, to notice the statutory provisions concerning such an allowance to a widow, and the rule of decision prevailing with respect to the construction of these sections.

Section 114, Revised Statutes 1909, provides as follows:

"In addition to dower, the widow shall be allowed to keep as her absolute property a family Bible and other books, not to exceed two hundred dollars; all the wearing apparel of the family, her wheels, looms and other implements of industry; all yarns, cloth and clothing made up in the family for their own use; all grain, meat, vegetables, groceries and other provisions on hand provided and necessary for the subsistence of the widow and her family for twelve months; her household, kitchen and table furniture, including beds, bedsteads and bedding, not to exceed the value of five hundred dollars."

The next succeeding section, viz., section 115, is as follows:

"If the grain, meat or other provisions allowed the widow in the preceding section shall not be on hand at the time of taking the inventory, the court shall make a reasonable appropriation out of the assets of the estate to supply such deficiency."

Digitized by Google

These sections have been frequently construed by our courts with regard to the right of the widow in respect to the property mentioned in Sec. 114, and the allowance to her provided by section 115. In Campbell v. Whitsett, 60 Mo. App. 444, decided by the Kansas City Court of Appeals, in treating of the nature of the allowance provided to the widow in lieu of provisions, the court said:

"The year's provision allowed her is her absolute property. So if it be not on hand, the money in lieu thereof would be hers as her absolute property and not depending upon her place of residence after her husband's death. We deem this to be the logical result of the cases of Cummings v. Cummings, 51 Mo. 261, and Hastings v. Myers, 21 Mo. 519. . . .

"A judgment for the widow under this statute should be no more than a judgment establishing the claim; or an order appropriating assets, ascertained to be unappropriated, to the payment of the claim and ordering it paid."

In Waters v. Herboth, 178 Mo. 166, 172, in treating of what are now sections 114 and 115, supra, and section 116 which allows to the widow additional personal property not exceeding four hundred dollars in value as her absolute property, the Supreme Court said:

"Those sections were not designed to affect the final distribution, but the idea was to allow the widow to have those articles in the beginning.

"They were to be separated from the estate that was to be administered, to form no part of it, neither for the creditors nor the distributees; they were to be given to the widow in the first place, and it was only what was left after those articles were given to the widow that was to be treated as the estate to be administered.

"This is further shown by section 2, in the same chapter (now section 10, Revised Statutes 1909 which

Digitized by Google

is to the effect that if there is no more in the estate than those articles and that amount of money, there shall be no administration."

We are not, of course, directly concerned with the absolute property of the widow, of the value of four hundred dollars, allowed her under section 116, supra, but it is quite clear that the property mentioned in section 114 is the absolute property of the widow as well as that mentioned in section 116; and from the language employed by the Supreme Court in the opinion just referred to, it is equally clear that the allowance in lieu of the provisions mentioned in section 115 is to take the place of the latter, and is likewise regarded as her absolute property. If the grain, meat, vegetables, groceries and other provisions be on hand, for the subsistence of the widow and her family for twelve months, such becomes and is the absolute property of the widow, and does not enter into or form any part or parcel of the estate to be administered upon. And if such property be not on hand, the widow is entitled, as a matter of absolute right, to an allowance in lieu thereof, and the only discretion vested in the probate court with respect to the same pertains to the amount to be ascertained and appropriated to supply the deficiency.

In Lowe v. Lowe, Exrs., 163 Mo. App. l. c. 213, 146 S. W. 100, it is said:

"Section 115 provides that if the latter articles are not on hand a reasonable appropriation shall be made out of the assets of the decedent's estate to supply such deficiency. It appears to us that the policy of the law is to place the articles enumerated in section 114 upon the same footing as dower. The widow is as much entitled to the allowance in question as she is to the family Bible, her clothing and other articles enumerated in said section. It goes to her absolutely by operation of law and free from the debts and liabilities of the husband."

Digitized by Google

And upon this same question see, also, Bryant Admr. v. McCune, 49 Mo. l. c. 547; Whaley v. Whaley, 50 Mo. l. c. 582; Glenn v. Gunn, 88 Mo. l. c. 445; Martin v. Jones, 155 Mo. App. l. c. 497, 134 S. W. 1097; Nelson v. Troll, 173 Mo. App. 51, 156 S.W. 16; Estate of Ulrici, Thompson, Admr., v. Johnson, 177 Mo. App. 584.

From the foregoing, it quite clearly appears that the allowance to the widow in lieu of provisions is not to be regarded as a *demand* against the estate, as appellant apparently seeks to have us treat it, but that it is something to which the widow is entitled, as a matter of absolute right, and is upon the same footing, so far as the law can place it, as the articles themselves which under section 114 the widow is allowed to keep as her absolute property, and for the supplying of a deficiency therein the allowance is made. If the provisions themselves are not on hand, it is the imperative duty of the probate court to make an order appropriating sufficient funds out of the estate to supply such deficiency, to the extent at least that there are funds available therefor. And, with respect to this matter, the power of the probate court extends merely to the matter of ascertaining and appropriating such sum as in the court's discretion will supply the deficiency mentioned in the statute. And the widow's right to such allowance is absolute, regardless of whether the estate be solvent or insolvent, or whether such allowance renders it insolvent. Indeed we have but recently held that the property thus allowed to the widow is chargeable with no expense whatever, not even the costs and expenses of administration. [Estate of Ulrici v. Johnson, supra.]

And we are further fortified in our opinion that such allowance is not to be regarded in any sense as a demand against the estate, by the language of section 289, Revised Statutes 1909, relative to appeals from the probate court, which is as follows:

Digitized by Google

"Appeals shall be allowed from the decision of the probate court to the circuit court in the following cases: First, on all demands against an estate exceeding ten dollars; Second, on all settlements of executors and administrators; Third, on all apportionments among creditors, legatees or distributees; Fourth, on all orders directing the payment of legacies, making distribution *or making allowances to a widow,*" etc.

From this it appears that the lawmakers did not regard the allowance as being a demand against the estate; for had this been so, it would have been deemed included within the clause of the above section relating to demands, and there would have been no necessity to specially provide for appeals from "allowances to a widow."

With respect to such allowances, it is said by the Supreme Court in Whaley v. Whaley, supra:

"It was not an action to recover money or propetry or damages, but it was a right depending wholly upon the exercise of the discretion of the court. The judgment is erroneous because it is an absolute judgment against the executors, instead of an appropriation of the assets in their hands, as the law requires."

That such an allowance has the force of a judgment we think cannot be doubted, but the judgment is one merely determining the amount which the widow shall have to supply the deficiency mentioned, and appropriating the same; the widow's right thereto beeing paramount to the rights of creditors and others interested in the estate. The matter is, therefore, one of a nature peculiar to itself, and the proceeding is totally unlike the establishing of a demand or claim against the estate.

In this view, we are of the opinion that there no notice was necessary to creditors or others interested in the estate; and that where the widow is also administering upon the estate, there is no necessity for the appointment of an administrator *ad litem* upon appli-

Digitized by Google

cation being made by her for such allowance. The law makes no provision as to notice to creditors or others. In general, "the law, in accordance with the principles of justice, . . . will require that notice be given before any person be passed upon, either in person, estate or any other matter or thing to which he is entitled, and although the statutes do not in terms require notice, the law would imply that such notice was intended." [See State ex rel v. Walbridge, 119 Mo. l. c. 394, 24 S. W. 457; State ex rel. v. Holtcamp, 245 Mo. 655, 670, 151 S. W. 153.] But as we have, in effect, said above, owing to the exceptional nature of this proceeding, and the absolute right of the widow in the premises, we think it cannot be said that any one was entitled to notice; for it is in no sense a controversy between the widow and the estate, or between her and creditors or others interested therein.

We are, therefore, of the opinion that the order made was not void or even voidable for the reason that it was made without the appointment of an administrator *ad litem* and without notice to creditors or others. On the other hand, we are fully persuaded that the order is in fact a judgment—a judgment ascertaining the amount of the allowance, and appropriating the same to the widow. [Campbell v. Whitsett; Whaley v. Whaley, supra.] And that it is a final judgment we think quite clearly appears from the provisions of section 289, Revised Statutes 1909, supra, providing for an appeal therefrom.

The immediate succeeding section, 290, provides that the appeal shall be taken during the term at which the decision complained of is made, or within ten days thereafter—or within twenty days if the appellant be a nonresident. And in this connection we may say that there must have been a purpose on the part of the lawmakers in providing that appeals may be taken from a judgment of the probate court within ten days, or twenty days, after the expiration of the term. The

Digitized by Google

object of this provision is evidently to afford an opportunity for persons interested in an estate, at or after the close of a term of such court, to ascertain what proceedings were had in the estate during the term, in order to exercise the right of appeal from any appealable order entered during such term. Bearing this in mind, it would seem that the view which we take of the matter before us does not, as appellant asserts, leave a creditor virtually without any recourse in the premises. Such right as a creditor has he is not wholly deprived of; for whether he has notice of the proceedings or not, he may exercise his right to appeal therefrom, provided of course he is diligent and prosecutes such appeal within the statutory period. Here no appeal was taken during the statutory period; but at the second term after that at which the allowance was made, and more than six months after the entering of such order, the petitioning creditor applied to the probate court to have respondent's allowance reduced.

In view of what we have said above, we think that when the order was made, and the term thereafter suffered to lapse, and no appeal was prosecuted therefrom within the statutory period, the order became a final judgment, and that the probate court was without jurisdiction to set it aside at a subsequent term, and that its act in so doing was null and void.

The argument of learned counsel for appellant, that such an order is interlocutory in its nature and is subject to review and correction at any time during the period of administration, and only becomes final upon the final settlement of the estate, does not appear to us as being sound, nor in keeping with the policy of our law with respect to allowances to the widow. As is said in Waters v. Herboth, supra, it was evidently the intention of the lawmakers to allow the widow to have the articles constituting her absolute property, or an allowance to supply the deficiency with

Digitized by Google

respect to provisions, in the very beginning. And it would by no means appear to be in keeping with the policy of the law on the subject to say that an allowance might be made to the widow at the beginning of the period of administration, designed for her subsistence for a period of twelve months, and which she will supposedly proceed to utilize and consume, and then to say that at any time prior to the final settlement of the estate the probate court may set aside the allowance and order her to refund a portion thereof.

We think that it clearly appears that the order is classed among those orders and judgments of the probate court which are final in their nature; and that since the right of appeal therefrom is specifically provided by statute, when the statutory time for appeal is allowed to pass, the power of the probate court over it is at an end and its judgment in the premises is final and binding upon all interested in the estate. In this connection see, also, In Re Stephens, 83 Cal. 322; 1 Woerner on American Law of Administration (2 Ed.) Sec. 93, p. 205; Pettee v. Wilmarth, supra.

And in this connection we may say that, in our opinion, section 220, Revised Statutes 1909, authorizing the probate court to vacate an order allowing a demand against an estate within four months after the allowance thereof, is here inapplicable, for the reason that such section applies alone to demands against an estate and not to an allowance to the widow with respect to her absolute property. And were it applicable, it would avail appellant nothing here, for the reason that it appears from the record that more than five months elapsed after the entry of the original order before the appellant sought to have the same set aside.

For the reasons given above the judgment of the circuit court should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

Digitized by Google

LASAR MANUFACTURING COMPANY, Respondent v. PELLIGREEN CONSTRUCTION & INVESTMENT COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **BUILDING CONTRACTS: Meaning of Terms: "Furring:" Evidence.** A contract for the erection of a school building required plaintiff to furnish furring for plaster ceilings, metal plaster partitions and metal lathing, and also declared that building terms used should have the meaning given them in a particular dictionary of architecture. The definition of the word "furring" in such work was: "A light framework or simple strips, generally of wood, but sometimes of metal, applied to walls, beams or similar surfaces, to support sheathing, plaster or other form of finish. Its purpose is either to give a more even structure for application of such finish, or to form an air space behind such finish, or to give a semblance of constructive form, as the imitation of a vault, by means of some plastic material carried on a frame of the necessary shape." *Held*, that the definition was itself ambiguous, and hence it was proper to admit expert evidence to determine whether such word included steelwork attached to trusses consisting of strips or bars of steel three inches wide by three-eigths of an inch thick and weighing approximately three pounds to the foot, to which other strips of light "channel iron" were tied to sustain metal lathing and plaster finish. [REYNOLDS, P. J., dissents.]

2. **APPELLATE PRACTICE: Excessive Recovery: Prerequisites to Review.** The question as to the excessiveness of the verdict will not be considered, on appeal, unless complaint of the amount of the verdict is made in the motion for a new trial.

3. **DAMAGES: Building Contracts: Recovery for Partial Performance: Amount of Recovery.** In an action by a subcontractor who was prevented by the contractor from completely performing his contract, *held* that a verdict for an amount bearing the same ratio to the total contract price as the amount of work done by plaintiff bore to the entire work contracted for, was not excessive.

4. ———: ———: ———: ———. Where a subcontractor was prevented by the contractor from completely performing his contract, he could not recover for the work performed in an

Digitized by Google

amount in excess of the contract rate, although there was evidence that the reasonable value of the work performed was greater than the contract rate.

Appeal from St. Louis City Circuit Court.—*Hon. Geo. H. Shields,* Judge.

AFFIRMED.

Jos. G. Holliday and *Geo. L. Neuhoff* for appellant.

(1) If the disputed iorn work in the auditorium, which the subcontractor refused to do, was "furring" within the meaning of the contract between the parties, so that he was not justified in quitting his job, but should have erected the same under his contract, in that event he can recover of the principal contractor, not the reasonable value of his work, regardless of the contract price, but such pro rata portion of the contract price as the amount of labor and materials furnished by him bears to the entire amount he was to furnish under the contract, less, of course, the $2000 already paid him on account. Barcus v. Road Co., 26 Mo. 102; Marsh v. Richards, 29 Mo. 99; Rude v. Mitchell, 97 Mo. 365; Morton v. Forsee, 249 Mo. 409. (2) Where the specifications provide that all building terms shall have the meaning given them in a certain technical dictionary, and the definition given in the dictionary is read in evidence, it becomes the test as to whether certain disputed work is or is not "furring" and the determination of that question cannot properly be left to the mere opinion of experts, regardless of the dictionary. McGregor v. Construction Co., 188 Mo. 611; Commission Co. v. Spencer, 205 Mo. 105; Light & Power Co. v. Young, 146 Ky. 430; Morrison v. Wilson, 30 Cal. 344. (3) A technical definition of "furring" which, by reference thereto in a contract for certain iron work on a building, is made part of

Digitized by Google

such contract, cannot be lightly brushed aside as ambiguous. (a) Because it states that "furring" may be either of wood or of metal, there being no pretense by either party that wood was anywhere specified or even thought of; (b) nor because there is a statement at the end of the definition, that the term has recently, by extension, been applied also to hollow brick or tile used for the same purposes, there being no pretense by either party that any such materials were anywhere specified or even thought of; (c) nor because the definition on its face is broad enough to include several varieties of furring, some of which might be more appropriate for one, and some for another of the various given purposes for which "furring" is used, provided only that the definition sets out in unambiguous language a test by which it can be decided whether the various portions of the iron work in the specifications are or are not "furring." Farm & Dairy Co. v. Prindle, 249 Mo. 600. (4) If a special finding of fact is unsupported by the evidence and relates to material issues, the proper step for the court is to grant a new trial. It cannot amend its special finding after judgment has been rendered. Freeman v. Hemenway, 75 Mo. App. 617.

Bishop & Cobbs for respondent.

Parol evidence was admissible to supply an omission in the written contract which otherwise would be ambiguous and inexplicable, and was admissible to explain the terms of the written instrument, to render them definite and certain. Goodrich v. McCleary, 3 Neb. 123; Chambers v. Ringstaff, 69 Ala. 140; Door v. School District, 40 Ark. 237; Walker v. Wells, 25 Ga. 141; Messick v. Sunderland, 6 Cal. 297.

ALLEN, J.—This is an action to recover a balance claimed to be due plaintiff from defendant for the

Digitized by Google

reasonable value of certain work performed and materials furnished, after the allowance of a credit of $2000 paid thereon. The suit was instituted against defendant and the latter's surety upon a certain bond given, but the cause proceeded to judgment below against the defendant only, and is appealed here by it.

It appears that the defendant was the general contractor for the erection of the Sumner High School building in the city of St. Louis, under certain plans and specifications furnished by the architect of the school board of said city. On November 16, 1908, plaintiff made the following proposition to defendant:

"Pelligreen Construction Company, City. Gentlemen: We propose to furnish and erect the following work for the Sumner High School, as per plans and specifications, W. B. Ittner, architect, and according to revised plans for the two gymnasiums on third floor. Furring for plaster ceilings, metal plaster partitions and metal lathing, for the sum of thirty-seven hundred and twenty dollars ($3720)."

On May 21, 1909, defendant replied to the above proposition, accepting the same, as follows:

"Your proposition for furnishing and erecting work at the Sumner High School as per your letter of November 16th, is hereby accepted by this firm for the sum of $3720.

"We would be pleased to have you prepare to get this work out for us at your earliest convenience."

The evidence discloses that plaintiff duly entered upon the performance of that part of the work thus contracted to be done by it, and completed the same, to the defendant's satisfaction, with the exception of certain work to be done in the auditorium of said building; that with respect to the latter, a controversy arose between plaintiff and defendant as to whether certain iron framework to be attached to certain beams or trusses in this auditorium was "structural iron,"

Digitized by Google

or whether it was "furring" within the contemplation of the contract.

It appears that there were four large beams or trusses in the auditorium, extending entirely across the room, which were each intended to be surrounded by a steel framework, and the whole enclosed by plastering. It seems that this steel framework was to consist of strips or bars of steel three inches in width by three-eighths of an inch in thickness and weighing approximately three pounds to the foot, and was to be attached to the beams or trusses by rivets; the holes in the large beams for thus riveting the same having been bored at the shop where such beams were made. It appears that to the steel bars, constituting the framework above mentioned, were to be attached strips of light "channel" or "angle" iron, the same to be tied on with copper wire of a certain size, and that to this, in turn, metal laths were to be tied with like wire to receive the plastering or finish.

The steel framework, to be immediately fastened by rivets to the large beams or trusses, is also referred to in the evidence as a series of brackets that were bent to form a "cornice" which was to extend around the beams. And these "brackets" are also referred to as "hangers."

The plaintiff declined to furnish and install these steel bars forming this framework, which was to be attached immediately to the large beams or trusses, upon the ground that the same was not within the contemplation of its contract; but offered to complete the remainder of its work in the auditorium as soon as the defendant should erect this framework in dispute. The defendant, on the other hand, claimed that the disputed work came within the terms of plaintiff's contract, refused to install it, and later sublet to another contractor the work unfinished by plaintiff in the auditorium.

Digitized by Google

The plaintiff alleged that the reasonable value of the work performed by it was $3320, gave credit for $2000 paid thereon, and prayed judgment for $1320.

Defendant denied owing plaintiff anything in the premises; and interposed a counterclaim, praying judgment thereon in the sum of $230 for damages alleged to have accrued to it by reason of delay caused by plaintiff's alleged failure to carry out the terms of its contract.

The cause was tried before the court without a jury, a jury having been waived, and resulted in a judgment for plaintiff on its cause of action in the sum of $1182.14, and for plaintiff on defendant's counterclaim.

At the request of appellant, the learned trial judge made a special finding of facts, stating separately his conclusions of law; and therein quite clearly stated the pertinent facts and the conclusions which he reached.

The point in controversy pertains to the use of the word "furring" in the contract. It appears that the specifications referred to in plaintiff's proposal above set out, and which were thereby called into the contract for appropriate use in construing the same, contained the following clause: "Building terms used shall have the meaning respectively set down to them in the revised city building ordinances and the Dictionary of Architecture and Building, by Russell Sturgis."

It was not made to appear that the "revised city building ordinances" throw any light upon the meaning to be given to the word "furring," but it was shown that the word is defined in Russell Sturgis's Dictionary of Architecture and Building as follows:

"Furring.—A light framework or simple strips; generally of wood, but sometimes of metal; applied to walls, beams or similar surfaces to support sheathing, plaster or other form of finish. Its purpose is either to give a more even structure for application of such

Digitized by Google

finish, or to form an air space behind such finish, or to give a semblance of constructive form, as the imitation of a vault, by means of some plastic material carried on a frame of the necessary shape. By extension in recent times hollow brick or tile used for such purpose."

Appellant's counsel contended below that this dictionary definition was conclusive as to the construction to be placed upon the term in question as employed in the contact, and that it was error for the court to admit, as it did, expert testimony for the purpose of arriving at the meaning to be ascribed to this important word in the contract. And this is the chief point urged upon us for a reversal of the judgment.

There can be no doubt, and it is conceded, that in interpreting the contract with respect to the meaning to be given to the word "furring" employed therein, the definition of such term as found in the dictionary to which the specifications refer is to control; provided such definition is unambiguous and clear, so that by applying the same the matter is altogether free from doubt. The lower court's ruling, however, proceeded upon the ground that such definition was in fact ambiguous and indefinite to the extent that it did not solve the question presented.

Learned counsel for appellant contend that there is no ambiguity in the definition, and say, in effect, that anything is to be regarded as "furring," within the meaning of the contract, which can in any manner be said to be comprehended within said dictionary definition thereof. We think that this does not follow, however, for a reading of the definition given shows that it is intended to comprehend within its terms all forms of construction which may, under any circumstances, be included within the terms "furring;" though it may well be that a form of construction there mentioned is not always to be regarded as "furring."

Digitized by Google

It is quite apparent that the dictionary definition is so far ambiguous as to leave wholly in doubt the crucial question here involved. The word is there defined as meaning "a light framework or simple strips." We are then told how it is applied, and its purpose or functions; one of the latter being "to give a semblance of constructive form . . . by means of some plastic material carried on a frame of the necessary shape." It is clear that the "framework" or "frame mentioned in the definition is a *light* one. But "light" is a relative term, and when a frame, or framework, would fall within this definition is by no means clear. In the instant case it appears from the evidence that the steel strips or bars to be riveted to the large beams were such as might be termed heavy, when compared with ordinary furring, though light in comparison with the large beams. It appears that they were three inches wide, three-eighths of an inch thick and weighed about three pounds to the linear foot; while the ordinary furring is described as "light channels, T's, or flats," intended to be set on edge a foot or more apart, and weighing about nine ounces per foot. Were we confined to the dictionary definition alone it would be quite doubtful indeed whether framework made of such bars as these could be said to be comprehended within the term, "light framework."

Again, it appears that the "light framework or simple strips," referred to in the definition, are intended "to support sheathing, plaster or other form of finish." If by this it is meant to be immediately attached to and support such plaster or finish, or the lathing which directly carries the latter, then the steel framework here in controversy would appear not to fall within the meaning and purport of the definition; for it is altogether clear that, while this framework ultimately supported the plaster, it did so only by supporting intervening light strips of channel iron, constituting ordinary furring, the latter supporting the

Digitized by Google

metal lathing upon which the plaster was to be placed. The most favorable view of this question for the plaintiff is that the definition is ambiguous and indefinite as to this.

Certain it is that it is not every metal framework that may directly or indirectly support plastering that can be termed "furring." Here, in fact, the evidence tended, with considerable force, to show that this steel framework which was much heavier than the ordinary furring, and which was intended to be firmly riveted to the large beams, while the ordinary furring was tied on by wire, was not furring, but a part of the structural steel work of the building. The matter was not free from doubt, however, and the court quite properly received the testimony of experts experienced in that class of business in order to arrive at the meaning to be given to the word "furring" in construing the contract. And under all the evidence the court found that the disputed work was not furring, within the meaning of the contract; and concluded that the contract did not require plaintiff to install the same. We perceive no error in this.

The only remaining point pertains to the amount of the verdict. This may be very briefly disposed of, not only for the reason that appellant in its motion for a new trial did not complain of the amount of the verdict, but for the further reason that it appears that the amount thereof bears the same ratio to the total contract price as the amount of work done by plaintiff bears to the entire work contracted for, under the foregoing construction of the contract. There was evidence that the reasonable value of the work per square foot was greater than the contract price; but plaintiff could not recover therefor in excess of the contract rate, and was not permitted so to do.

It follows from what we have said above that plaintiff is not chargeable with a breach of its con-

Digitized by Google

tract, and that the defendant's counterclaim was properly disallowed.

The judgment should be affirmed. It is so ordered. *Nortoni, J.*, concurs. *Reynolds, P. J.*, dissents, holding that the definition of "furring" given in the dictionary referred to and adopted in the contract, is unambiguous, needed no explanation and binds plaintiff to do the work which it refused to do.

NAT SMALL, Respondent, v. POLAR WAVE ICE & FUEL COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **MASTER AND SERVANT: Injury to Servant: Dual Capacity Doctrine.** The master's liability for injury to a servant, asserted on the ground of negligence of a servant occupying the dual capacity of fellow and superior servant, depends on the character of the act and not on the rank of the servant.

2. **———: ———: ———: Concurring Negligence.** Where the negligence of the master, whether through the negligent act of a vice principal or otherwise, is combined with the negligent act of a fellow servant in producing an injury to a servant and the negligence of neither alone is the efficient cause thereof, the master is liable.

3. **———: ———: ———: Negligence of Foreman: Liability of Master.** A foreman is the *alter ego* of the master, so that if the foreman orders a servant to perform an unusual task, disassociated from the latter's ordinary duties and involving dangers unknown to and unappreciated by him, and the foreman negligently inflicts injury upon him while he is attempting to carry out such order, the master is liable.

4. **———: ———: ———: Vice Principal or Fellow Servant: Concurring Negligence.** Plaintiff was ordered by his foreman to assist the latter in letting down a heavy iron gate. While engaged in obeying this order, plaintiff's hand was caught under the gate, as a result of the foreman prematurely lowering his end. *Held*, that the undertaking not being one of ordinary common labor in which the servant and the foreman were engaged as co-laborers upon an equal footing, but a matter per-

Digitized by Google

taining to the foreman's duties, the latter was a vice principal, and the injury must be regarded as having been caused by the negligence of such vice principal in ordering the servant to perform an unusual task, outside the scope of his ordinary duties and involving more or less danger, without warning or instruction as to the latter, combined with his negligence in prematurely lowering his end of the appliance; and if the latter should be regarded as an act of a fellow servant (which is not decided), the master would nevertheless be liable, for, in that event, the injury would have come about through the combined negligence of the master and a fellow servant.

5. ———: ———: **Instructions: Broadening Issues.** In an action by a servant for injuries sustained by reason of the manner in which an appliance was used, where it was neither alleged nor proved that the appliance was in itself dangerous or unsafe, and the master's duty to furnish a safe place to work was not an issue, an instruction that it was the master's duty to furnish the servant with a reasonably safe place to work and authorizing a verdict on a finding that the appliance was dangerous or unsafe, was erroneous as being without the issues.

6. **INSTRUCTIONS: Broadening Issues.** The instructions must not broaden the issues made by the pleadings.

7. ———: **Not Supported by Evidence.** It is error to submit, as a predicate of liability, a matter which is not supported by any evidence, or which in no way gave rise to, or contributed to produce, the injury or loss for which a recovery is sought.

8. ———: **Not Predicated on Evidence: Referring to Pleadings.** An instruction, in an action for personal injuries, requiring the jury to find that plaintiff's fingers were injured "as set out in the petition," in order to return a verdict for him, was erroneous, since the instructions must be predicated on the proof and not on the pleadings.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

REVERSED AND REMANDED.

Igoe & Carroll and *Wm. R. Gilbert* for appellant.

(1) The court erred in not sustaining the demurrer to the evidence, because both by the petition and evidence it is shown that the injury resulted not from any exercise of a foreman's authority, but the

Digitized by Google

act of the foreman in handling the apron—purely an act of a mere workman. English v. Shoe Co., 145 Mo. App. 439, 452; Stephens v. Lbr. Co., 110 Mo. App. 398, 404. The character of the act, and not the title of the actor, determines his relation to the injured servant; if the act be colabor, and not the exercise of delegated authority, there is no liability on master's part. English v. Shoe Co., 145 Mo. App. 439; Dickinson v. Jenkins, 144 Mo. App. 133. (2) The proximate cause of plaintiff's injury was not the direction of the foreman, but his act in dropping the apron, the act of a fellow servant. English v. Shoe Co., 145 Mo. App. 439. (3) The court erred in giving the recovery instruction for plaintiff. (a) This instruction founds liability on the following elements not pleaded, and not proven: Failure to furnish a reasonably safe place to work; an unsafe and dangerous gate or apron, to handle. Instructions cannot enlarge the case pleaded. Kellogg v. Kirksville, 132 Mo. App. 519. Other acts than those pleaded cannot be proven to have caused or contributed to the injury, or submitted to the jury. Kirkpatrick v. Railroad, 211 Mo. 68. (b) The jury are referred to the petition and required to find plaintiff's fingers were injured "as set out in the petition." The jury look to the instructions, not the pleadings, and references to the pleadings constitute error. Jordan v. Transit Co., 202 Mo. 418; Masterson v. Transit Co., 204 Mo. 507. (c) Neither the order to do the work, the place, nor the condition of the apron, under the evidence, could in any way cause the injury. The submission of issues which could not affect the result is error. Huston v. Railroad, 129 Mo. App. 576. (4) The court erred in giving the instruction on the measure of damages. (a) The evidence does not show what plaintiff's loss of time was, or the extent to which he is disabled from earinng a livelihood. If the evidence fails to show the loss an instruction submitting this item is error. Davidson v. Co., 211 Mo. 320;

Digitized by Google

Boyce v. Railroad, 120 Mo. App. 168; McNeil v. City, 153 Mo. App. 424. (b) The evidence does not show what part of the disability is due to the injury to the fingers and what part to the hand, and plaintiff elected to go to the jury solely on the injury to the fingers. (c) There is no evidence that the injury is permanent. When there is no evidence as to permanency of injuries the submission thereof to the jury is erroneous. Prendenville v. Transit Co., 128 Mo. App. 596.

Wyrick & Eaken for respondent.

ALLEN, J.—This is an action by plaintiff for personal injuries received by him while in the employ of the defendant. The suit was instituted before a justice of the peace, where plaintiff had judgment. Upon appeal to the circuit court, and a trial *de novo* there, plaintiff again prevailed, and the defendant has appealed to this court.

The statement filed before the justice of the peace avers, in substance, that upon the date in question, while plaintiff was in defendant's employ, the latter's foreman ordered plaintiff to assist him in letting down a large, heavy iron gate or apron, used to regulate the supply of coal in the boiler room of defendant's ice plant in and about which plaintiff was employed; that while so engaged, under the direction of the foreman, the latter negligently lowered one side of said gate or apron, without warning to plaintiff, etc., whereby plaintiff's right hand was caught and injured.

The evidence discloses that plaintiff's duties, as a servant of defendant, were entirely separate and apart from anything pertaining to the gate or apron in question, and that he had never had anything to do with the latter except upon the occasion when he was injured. It is not altogether clear from the testimony just what was the character of this applicance, but it

Digitized by Google

appears that it extended in front of a hopper, and was used to regulate the coal supply; that it customarily hung upon two hooks, and that it was necessary to remove it in order to make a certain examination of the boilers.

It appears that defendant's foreman, one Fuqua, called to plaintiff to assist him in letting down this gate or apron, which it is said was quite heavy; that the foreman had hold of a hook at one end of the appliance, and directed plaintiff to raise a like hook at the other end thereof, and assist in letting the apron down. It seems that plaintiff undertook to do this, but did not succeed in getting his end unhooked before the foreman let down the other end, whereby plaintiff's hand was in some manner caught in or under the apron and injured.

I. It is urged that the evidence adduced was insufficient to take the case to the jury, and that appellant's demurrer to the evidence should have been sustained. Appellant's argument on this score is based upon the theory that the evidence showed that plaintiff and Fuqua were, at the time, engaged in performing common labor, and that Fuqua's act in prematurely letting down his end of the apron was the mere negligence of a fellow servant, for which there could be no recovery. And in support of appellant's position in this regard we are cited to the rulings in English v. Shoe Co., 145 Mo. App. 439, 122 S. W. 747; Rodgers v. Schiele, 148 Mo. App. 53, 127 S. W. 618; Dickinson v. Jenkins, 144 Mo. App. 133, 128 S. W. 280; Stephens v. Lumber Co., 110 Mo. App. 398, 86 S. W. 481.

But we are not persuaded that the evidence adduced failed to show any right of recovery by plaintiff. It is quite true that "the doctrine is firmly established in this State, with respect to the master's liability asserted on the grounds of negligence in a servant occupying a dual capacity, to the effect that it is

Digitized by Google

the *character of the act,* and *not the rank* of the servant which determines the liability or nonliability in a given instance." [English v. Shoe Co., supra; Mertz v. Rope Co., 174 Mo. App. 94, 156 S. W. 807, and authorities cited.] Nevertheless it is equally well settled that when the negligence of the master, whether through a negligent act of a vice principal or otherwise, is combined with the negligent act of a fellow servant in producing the injury, and the negligence of neither alone is the efficient cause thereof, the master is liable. [See Mertz v. Rope Co., supra, and authorities cited.]

The situation here was not such as was presented in the above mentioned cases upon which appellant relies. In English v. Shoe Co., supra, the injured servant and defendant's foreman regularly performed duties of a like character in working at a certain machine—though aside from such duties the foreman had certain authority over plaintiff and other employees. There the plaintiff's injury was caused purely by a negligent act of the foreman while working as a colaborer with plaintiff at the machine in question, and it was held that no exercise of any authority on his part in any way intervened.

In Rodgers v. Schiele, supra, the foreman and the injured servant reguarly worked together in cleaning certain brass plates, and it was held that the foreman's act in letting such a plate fall, whereby the servant assisting him was injured, was the act of a fellow servant and did not cast liability upon the master.

In Dickinson v. Jenkins, supra, a servant was injured by the fall of a timber from a pile of lumber, such fall resulting from the manner of piling the same. It appears that the method adopted was one in common use by the servant and his coemployees. The foreman, as a part of his usual duties, assisted in building the pile. It was held that the foreman's act in the premises was one of a fellow-servant, and plaintiff

Digitized by Google

could no more recover for his negligence than for that of any other coemployee.

In Stephens v. Lumber Co., supra, the servant was injured while unloading lumber from a car. It appears that the employee who was assisting with this work and whose negligence in prematurely releasing his end of a beam it is said caused the injury, was a traveling salesman for the master, who had been temporarily pressed into service to aid in the work of unloading cars. It was sought to show that he was in fact a foreman. Nevertheless it appeared that the work which both were performing at the time was mere common labor, and as plaintiff's injury was occasioned by the negligence of a fellow servant, he was not permitted to recover.

None of these cases are authority for denying a recovery to plaintiff in the instant case; nor are other cases of like character to which we might refer. The cause of action is very informally alleged in the statement filed, and the testimony respecting the pertinent facts is somewhat meagre. Nevertheless, it appears that the evidence tended to establish a cause of action in plaintiff's favor, and which proceeds upon the theory that it was negligence on the part of the foreman to order plaintiff to assist in lowering the apron, without warning of the danger which might attend the attempt to execute such order, or instruction as to how such danger might be avoided; and that such negligence was the negligence of the master, without which the injury would not have occurred.

The evidence tended to show that plaintiff's injury proximately resulted either from the negligence of the master alone, or that, because of the dual capacity of the foreman, it resulted from the negligence of the master combined with that of a fellow servant. It appears that plaintiff was a "coal passer," handling coal; that he had never had anything to do with the apron before, and had never seen it handled; that he worked in dif-

Digitized by Google

ferent parts of the building, and had never before happened to be present when the apron was lowered. Fuqua was in charge of this portion of the work of the master, and personally looked to the operation of the boilers and the generating of steam for the plant. And in this connection he had authority to give orders to the coal passers.

To lower the apron it seems that there was a hook to be unfastened at each end thereof, and it appears that plaintiff, in obedience to the foreman's order, was attempting to unfasten one of these hooks when the foreman lowered the other end of the apron, and plaintiff's hand was caught and injured. The matter was not one of ordinary common labor in which he and the foreman were engaged as colaborers upon an equal footing. It was a matter pertaining to the foreman's duties and was evidently an undertaking fraught with some danger to one unaccustomed to handling the appliance and ignorant of the manner in which it was operated.

The foreman is the *alter ego* of the master, and he may not order a servant to perform an unusual task, disassociated from the latter's ordinary duties, and which involves dangers unknown to and unappreciated by him, and then negligently inflict an injury upon such servant who is attempting to obey or carry out the order.

And it will not do to say that the manual act of lifting the apron was common labor in which plaintiff and Fuqua were engaged as colaborers and hence the injury was occasioned solely by the negligence of a fellow servant. The evidence shows quite clearly that there was more to be done than the mere manual act of lifting a heavy object, and the injury must at least be regarded as having been caused by the negligence of the vice principal in ordering the servant to perform what for him was an unusual task, outside the scope of his ordinary duties, and one involving more

Digitized by Google

or less danger, without warning or instruction as to the latter, combined with the foreman's negligence in prematurely lowering his end of the appliance. And should the latter be regarded as an act of a fellow servant—which we need not decide—the master is nevertheless liable, for in that event the injury comes about through the combined negligence of the master and that of a fellow servant, for which the master is liable. This question we have recently had occasion to consider in Mertz v. Rope Co., supra, and it is more fully discussed in cases which will be found there cited.

II. It is urged that error inheres in the instruction given for plaintiff purporting to cover the case and directing a verdict for him in the event that the jury found certain facts. This assignment of error is well taken. The instruction, among other things, told the jury that "it was the duty of the defendant to furnish the plaintiff with a reasonably safe place to work," and authorized a verdict upon a finding, among other things, "that the said gate or apron was dangerous and unsafe."

The duty of the master to furnish a safe place to work was in no way an issue in the case. And it was not alleged nor was there any evidence to show that the gate or apron was in itself dangerous or unsafe; though danger might attend the execution of an order respecting the handling thereof by one in plaintiff's position, and under the circumstances appearing in evidence.

The instructions must not broaden the issues made by the pleadings. [See Kirkpatrick v. Railway, 211 Mo. 68, 109 S. W. 682; Kellogg v. Kirksville, 132 Mo. App. 519, 112 S. W. 296; Sinnamon v. Moore, 161 Mo. App. 168, 142 S. W. 494; Crayton v. Huntzinger, 163 Mo. App. 718, 147 S. W. 512; Gabriel v. Street Railway, 164 Mo. App. 56, 148 S. W. 168; Green v. United

Digitized by Google

Rys., 165 Mo. App. 14, 145 S. W. 861.] And it is error to submit, as a predicate of liability, something which there is no evidence to support, or which in no way gave rise to or contributed to produce the injury or loss for which a recovery is sought. [See Sallee v. McMurry, 113 Mo. App. 253, 88 S. W. 157; Houck v. Railway Co., 116 S. W. 559, 92 S. W. 738; Huston v. Railroad, 129 Mo. App. 576, 107 S. W. 1045; Shannon v. Abell, 155 S. W. 62; Kendrick v. Harris, 156 S. W. 490.]

And to submit matters which, under the evidence, could in no way have contributed to produce plaintiff's injury, is undoubtedly reversible error. In Huston v. Railroad, supra, l. c. 586, it is said:

"We find that prejudicial error was committed by the learned trial judge in submitting to the jury the issue of whether the injury was caused in whole or in part by the failure of defendant to maintain and use a toggle on the machine. The absence of this appliance did not and could not in any way have contributed to the injury. . . . In submitting this issue to the jury the court, in effect, declared that there were facts adduced by evidence from which the jury reasonably might infer that the absence of the toggle had a direct effect in the production of the injury. A declaration of this character which is unsupported by substantial evidence must be presumed to have had some effect on the minds of the jury and, consequently, to have been prejudicial to the defendant."

Further error inheres to this instruction in that it requires the jury to find that plaintiff's fingers were injured "as set out in the petition." Instructions should be predicated upon the pertinent facts in evidence (keeping within the scope of the pleadings), and should refer the jury to the evidence and not to the pleadings. [See Bank v. Dowler, 163 Mo. App. l. c. 68, 145 S. W. 843, and cases there cited.]

Digitized by Google

III. Error is also assigned with respect to the instruction on the measure of damages, in view of the evidence pertaining to plaintiff's injury and loss. It is unnecessary to discuss this instruction, however, for the errors, if any, inhering therein, will doubtless not reappear upon another trial of the cause.

It is unnecessary to pass upon the sufficiency of the statement of the cause of action to sustain a judgment. It may be well, however, to call attention to the fact that it does not clearly appear that the pleading counts upon the foreman's negligence with respect to the order given under the circumstances above mentioned.

The judgment is reversed and the cause remanded, with leave to respondent to amend his statement of the cause of action, if so advised. *Reynolds, P. J.,* and *Nortoni, J.,* concur.

S. R. MEUX, Respondent, v. JULIUS HALLER, Administrator, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **APPELLATE PRACTICE: Review of Question Whether Pleading is Departure: Prerequisites.** Where an amended statement is filed in the circuit court, on appeal from a justice's court, the original statement filed in the latter court, being an abandoned pleading, cannot be considered by the Court of Appeals, unless it is preserved in the bill of exceptions, and hence, where it is not so preserved, the question as to whether the amended statement was a departure cannot be considered.

2. **PRINCIPAL AND AGENT: Authority of Agent: Evidence.** The authority of an agent cannot be proved by his own declarations to third parties, although he is a competent witness to testify concerning the same, unless disqualified upon other grounds.

3. **———: ———: Appointment of Subagent.** As a general rule, an agent does not have the power to appoint a subagent or

Digitized by Google

otherwise delegate his authority, unless he is expressly authorized to do so.

4. ———: ———: **Sufficiency of Evidence.** In an action for the purchase price of produce shipped by plaintiff to defendant, *held* that it was a question for the jury, under the evidence, whether defendant's agent, with whom plaintiff made the contract of sale, had authority to make such contract on behalf of defendant.

5. ———: ———: **Evidence.** The existence of an agency or the extent of the agent's authority need not be established by direct and positive proof, but may be inferred from facts and circumstances, or implied from the course of dealing between the principal and agent; the scope of the agency being determined, not alone from what the principal told the agent to do, but from what he knows, or ought to know, in the exercise of ordinary care and prudence, concerning what the agent is doing in the premises.

6. ———: ———: **Question for Jury.** Where there is any substantial evidence from which an agent's authority may be fairly and reasonably inferred, the question is for the jury.

7. ———: **Sales: Action Against Principal: Instructions.** In an action for the purchase price of produce shipped by plaintiff to defendant, plaintiff claimed that defendant's agent instructed him to buy and ship the produce to defendant until notified to stop, and that he would receive $1 for each hamper, plus a commission. Plaintiff waived his right to the commission, and sought to recover on the theory of an outright sale of the produce. *Held*, that an instruction that if the jury believed defendant requested and directed plaintiff to buy and ship the produce until notified to stop, and promised to pay plaintiff one dollar for every hamper so shipped, and plaintiff made the shipment, he is entitled to recover, was not erroneous as abandoning the theory of an outright sale and submitting the case on a contract of employment to purchase, with guaranty.

8. ———: ———: ———: ———. In an action for the purchase price of produce, bought by plaintiff and shipped by him to defendant under a contract which plaintiff claimed defendant's agent had made, an instruction that, in considering the question of the authority of the agent to make the contract, the jury might consider other acts and conduct of the agent of which the defendant had notice, and that if the agent bought other like produce on behalf of defendant without objection, and defendant paid for it, then the agent's authority to contract with plaintiff might be inferred, was not vulnerable to the objection that it singled out evidence, nor to the objection that it charged the

Digitized by Google

jury that if the agent had authority to purchase produce for defendant, then the jury could infer that he had authority to employ someone else to purchase the same and to guarantee the net proceeds.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

AFFIRMED.

George B. Webster for appellant.

Nelson Thomas for respondent.

ALLEN, J.—This is an action growing out of a controversy over the shipment of a certain quantity of peas. The suit was instituted before a justice of the peace, where plaintiff prevailed; and upon appeal to the circuit court, and a trial *de novo* there, plaintiff again had judgment, from which this appeal is prosecuted.

The cause was originally instituted against one Albert S. Block, conducting a fruit and produce business in the city of St. Louis, under the name and style of A. S. Block & Company. It appears that, during the pendency of the suit in the circuit court, Block was declared to be of unsound mind by the probate court of said city, and one Maurice H. Biederman was appointed curator of his estate. The cause was thereupon duly revived against said Biederman as such curator, and resulted in a judgment against the latter, from which he prosecuted the appeal to this court. It further appears that thereafter, during the pendency of the appeal here Block died, and the cause has been revived against the administrator *pendente lite* of his estate.

Plaintiff filed in the circuit court an amended statement of its cause of action, upon which statement and the answer filed thereto the cause proceeded to trial. This amended satement avers, in substance,

Digitized by Google

that on or about May 20, 1909, the defendant, Albert S. Block, by his duly authorized agent, requested and directed plaintiff to buy peas at Keling, Tennessee, and ship the same to defendant until notified by the latter to stop; that defendant promised to pay plaintiff one dollar for every hamper of peas so shipped, and in addition thereto a commission for plaintiff's services of three per cent upon all such shipments. And it is averred that in pursuance of such agreement plaintiff shipped on divers dates a total of five hundred and fifty-six hampers of peas, whereby defendant became indebted to plaintiff in the sum of $556. And plaintiff expressly waives and relinquishes his claim for the said commission, acknowledges that defendant had paid him forty dollars on account of said shipments, then makes a voluntary credit upon the alleged indebtedness of the defendant to him in the sum of sixteen dollars, and prays judgment against defendant for $500 and interest.

The answer makes specific denials of the pertinent allegations of the petition, and avers that "all and any peas sent by plaintiff to defendant were sent on consignment, and that a full complete statement of what was done with said peas by defendant, while acting for and on behalf of the plaintiff, has by the defendant been made to plaintiff."

The evidence discloses that the plaintiff resided at Keling, Tennessee; that in May, 1909, he entered into an oral agreement with one Guillot respecting the shipment of peas to defendant. There is a controversy as to just what was the agreement made. It seems that plaintiff had some peas of his own which he had raised, and he testified that Guillot told him to ship these and to buy others and ship them, and that he would receive one dollar per bushel for all that he might ship to defendant, and in addition three per cent upon the sale price of the peas which he might purchase from others and so ship. And this, in substance,

Digitized by Google

is corroborated by witnesses who were present at the time of the conversation between plaintiff and Guillot.

At the time of this agreement, Guillot paid plaintiff forty dollars; and plaintiff testified that Guillot agreed to send the remaining money "by wire," upon shipment being made. Another witness testified that Guillot states that he would wire to defendant to send plaintiff a check. It appears that after shipping the peas, and not hearing from defendant, plaintiff called up the latter's place of business in the city of St. Louis over the long distance telephone, and some conversation was had with respect to the matter; but just what was said does not appear. On the same day defendant wrote plaintiff regarding the shipment, stating that the peas in question had become heated in transit, that the car containing the same had been wrecked, and that such of the peas as could be disposed of at all had been sold for a nominal price.

On behalf of plaintiff there was testimony of other witnesses who stated that Guillot at or about the time of the transaction with plaintiff, bought peas from them outright, paying therefor with drafts drawn upon defendant, and which were honored by the latter.

On behalf of defendant, there was testimony tending to show that Guillot had actual authority, as defendant's agent, only to solicit goods to be shipped defendant on consignment. Guillot so testified, denying that he had authority to make any purchase outright, and denying that he made the contract sued upon, but stating that the peas were to be consigned on a commission basis. He testified that the forty dollars which he had given plaintiff was loaned to the latter by him personally, to be repaid out of the proceeds ultimately to be derived from the sale of the goods shipped by plaintiff.

I. The first assignment of error pertains to the action of the trial court in overruling a motion of de-

Digitized by Google

fendant to strike out the amended statement filed. This proceeds upon the theory that this amendment changed the cause of action from that which was tried before the justice. And the second assignment of error also pertains to the amendment of the statement in the circuit court, the point being that the circuit court acquired no jurisdiction to try the issues raised by the amended statement because of the alleged variance between the latter and the issues tried before the justice.

We find, however, that the questions thus attempted to be raised are not before us for review, for the reason that the original statement filed before the justice is not included in appellant's bill of exceptions, nor there called for. It was an abandoned pleading, and could be made a part of the record only as a matter of exception; and not having thus been incorporated into the record, it is not before us. There is therefore nothing here for our consideration with respect to the character or effect of the amendment made. [See Railroad v. Bank, 212 Mo. 505, 111 S. W. 574; Forrister v. Sullivan, 231 Mo. 345, 132 S. W. 722; Campbell v. Boyers, 241 Mo. 421, 145 S. W. 807.]

II. It is urged that there was no competent evidence of the authority of Guillot to bind the defendant in the premises; and that for this reason the court erred in overruling defendant's demurrer to the evidence and permitting the case to go to the jury. It is quite true, as appellant says, that the authority of the agent cannot be proved by his own declarations to third parties; though he is a competent witness to testify concerning the same, unless disqualified upon other grounds. [Griswold v. Haas, 145 Mo. App. 578, 122 S. W. 781; Mitchell v. Samford, 149 Mo. App. 72, 130 S. W. 99.] The question here pertains to the extent of the agent's authority. It is conceded that he was in fact an agent of defendant, but it is denied that he had

Digitized by Google

authority to bind the defendant by such a contract as that upon which plaintiff relies and asserts was made. No assignment of error is made respecting the admission in evidence of testimony as to declarations of Guillot concerning his own authority. And we find in the record no specific objections made to such testimony as there was of this character. But it is urged that there was no substantial evidence, which was competent or had any probative force, to show that Guillot had authority to make the contract sued on. It is claimed that he had no authority to make purchases outright for the defendant, and none to employ some one else to make such purchases and bind defendant to pay a commission or other compensation therefor.

Undoubtedly the rule is, that in general an agent does not have authority to appoint a subagent, or otherwise delegate his authority, unless he is expressly authorized so to do. [See Hodkinson v. Machinery Co., 161 Mo. App. 87, 142 S. W. 457.] But we deem this question not material here, in the state of the record before us. It is true that plaintiff avers an agreement to pay him a commission upon goods purchased by him from others and shipped to the defendant. However, plaintiff is not seeking to charge defendant with liability therefor, but disclaims and relinquishes any claim on account thereof. Plaintiff asserts that, aside from the matter of commission, the agreement was to pay him one dollar per bushel hamper for all peas shipped to defendant. Plaintiff's cause of action does not proceed upon the assumption that Guillot had authority to appoint subagents, or employ others, but upon the ground that he was authorized to contract for the purchase of produce for defendant and to bind the latter to pay the agreed price therefor. Respecting this question there is evidence in the record from which we think it may be fairly inferred that he did have such authority, and that hence this question became one

Digitized by Google

to be determined by the jury under all the facts and circumstances appearing in evidence.

It appears that Guillot was a traveling representative of defendant soliciting business for the latter; that he had dealings with various persons in the vicinity in which plaintiff lived at or about the time of the transaction here in question; that he not only dealt with plaintiff, but that he actually purchased peas for defendant from other persons in the vicinity, and paid for the same with drafts drawn on the defendant, and which the defendant honored and paid; and that he paid plaintiff forty dollars at the time of making the contract.

The existence of the agency, or the extent of the agent's authority, need not be established by direct and positive proof but may be inferred from facts and circumstances in evidence. And if there is any substantial evidence from which the agent's authority may be fairly and reasonably inferred, the question is one to be referred to the jury. [See McCloud v. Telegraph Co., supra; Distillery Co. v. Van Frank, 147 Mo. App. 204, 126 S. W. 222; Phillips v. Geiser Mfg. Co., 129 Mo. App. 396, 107 S. W. 471; Hackett v. Van Frank, 105 Mo. App. 384, 79 S. W. 1013; Heffernon v. Boteler, 87 Mo. App. 316; Bonner v. Lisenby, 86 Mo. App. 666; Harrison v. Railway Co., 50 Mo. App. 332; Cummings v. Hurd, 49 Mo. App. 139.] The authority of the agent may be implied from the course of dealing between the principal and the agent. [See McCloud v. Telegraph Co., supra, l. c. 630, 631 and cases cited.] And "the scope of an agency is to be determined not alone from what the principal may have told the agent to do, but from what he knows or ought to know, in the exercise of ordinary care and prudence, the agent is doing in the premises." [Law Reporting Co. v. Grain Co., 135 Mo. App. 10, 115 S. W. 475.]

We are of the opinion that the evidence was sufficient to warrant the submission of this question to the

Digitized by Google

jury, and that the court could not, under the circumstances, have declared as a matter of law that there was no evidence from which the agent's authority to make the contract in question could be reasonably inferred.

III. A further assignment of error pertains to the giving of an instruction at the request of plaintiff which, in substance, told the jury that if they believed from the evidence that defendant requested and directed the plaintiff to buy and ship peas to defendant until notified to stop, and that defendant promised to pay plaintiff one dollar for every bushel so shipped, and that plaintiff in reliance thereupon made shipment of peas to defendant, then plaintiff was entitled to recover.

This instruction is assailed upon the ground that plaintiff thereby "abandoned the theory of an outright sale of the peas, and submitted his case on a contract of employment to purchase, with guaranty." We are unable, however, to see any merit in this contention. The instruction authorizes a recovery upon a finding that defendant promised to pay plaintiff one dollar for every hamper of peas shipped. This is the theory upon which plaintiff's cause of action proceeds, as shown by the essential averments of his statement thereof. It is bottomed upon this alleged promise to pay a certain price per bushel for the peas. We perceive no error in the giving of this instruction.

IV. Another instruction given for plaintiff is complained of, which is as follows:

"In considering the question of the authority of Guillot to make a contract with the plaintiff for and on behalf of the defendant, if you find from the evidence that Guillot did make, or attempt to make such contract, you may take into consideration the other acts and conduct of said Guillot, of which the defendant had notice, and if you find that Guillot bought peas for and

Digitized by Google

on behalf of defendant to the knowledge and without the objection of the defendant and that defendant paid for said peas, then you have the right to infer that said Guillot had authority from the defendant to make purchases on his (defendant's) account from other persons as well, including the plaintiff."

It is said that this instruction tells the jury that if Guillot had authority to purchase peas for defendant, then the jury may infer that he had authority to employ some one else to purchase the same and to guarantee the net proceeds. And it is also assailed upon the ground that it "singles out a particular portion of the evidence, emphasizes it with undue prominence and bases a conclusion of law upon it, without reference to the other testimony in the case bearing upon the same proposition."

But we think that the instruction is not vulnerable to attack upon either of such grounds. It merely tells the jury that Guillot's authority to purchase goods for defendant and to bind the latter to pay therefor, may be inferred from like dealings on his part with others which were known to the defendant and sanctioned by him. As we have said, there was testimony from which such authority on the part of the agent might well be inferred; and it was merely sought by this instruction to tell the jury that they were at liberty to draw such inference, if they found the facts mentioned. This in fact was the very crux of the case. It was proper to instruct the jury thereon, and it did not give undue prominence to a portion of the testimony.

A careful examination of the record has revealed no reversible error. There was substantial evidence in support of plaintiff's case; and the jury evidently found the issues of fact in his favor, both as to the agent's authority and the character of the contract made. The judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni*, J., concur.

Digitized by Google

LOUISE LAZERINE, Respondent, v. LORENTZ LAZERINE, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** It is not error to refuse an instruction where the matter it covers is fully covered by another instruction given.
2. **APPELLATE PRACTICE: Conclusiveness of Verdict.** The appellate courts are not permitted to disturb a judgment on the ground that the verdict is against the weight of the evidence; the only question on this score that is open to review being, whether there is any substantial evidence to support the verdict.
3. **CONVERSION: Evidence: Relevancy.** In a suit by defendant's divorced wife to recover the value of personal property which she claimed he had converted, but which defendant claimed he had given to her conditionally, retaking it because she did not comply with the conditions, *held* that evidence as to plaintiff's private affairs and the business conducted by her and defendant prior to her receiving the property was properly admitted in support of plaintiff's theory that the property was purchased with funds accumulated by the joint efforts of both of the spouses, and was given to plaintiff unconditionally, because of her services.
4. **TRIAL PRACTICE: Credibility of Witnesses: Question for Jury.** The weight of the evidence and the credibility of the witnesses giving it are questions for the jury.
5. **DAMAGES: Excessive Recovery: Remittitur.** An award of excessive damages may be cured by remittitur.
6. **———: Conversion: Excessiveness of Recovery.** In an action for the conversion of diamonds, *held* that a judgment in favor of plaintiff for $800 was not excessive.
7. **PLEADING: Variance: Mode of Objecting.** The party complaining of a variance between the pleading and the proof must not only interpose a timely and specific objection to the introduction of the evidence offered, but must file an affidavit of surprise, as required by Sec. 1846, R. S. 1909, and if he fails to do so, he will not be heard to complain in the appellate court.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

Digitized by Google

AFFIRMED.

Frank A. Habig for appellant.

H. W. Femmer for respondent.

ALLEN, J.—This is an action for the conversion of certain jewelry and other personal property; it being alleged that plaintiff was the owner and entitled to the immediate possession thereof on January 18, 1912, and that on said day the defendant converted the same to his own use.

Plaintiff and defendant were husband and wife at the time of the alleged conversion; but a divorce had been granted the defendant prior to the institution of this suit. It appears that the property alleged to have been converted had been purchased by the defendant, and it seems with money earned by the joint efforts of plaintiff and defendant in conducting a rooming house and hotel business, and had been given by defendant to plaintiff; that shortly prior to the separation between them, as husband and wife, defendant took possession of the property, and refused, upon demand therefor, to surrender it to plaintiff. It was defendant's contention that the property, or the greater part thereof, had been by him originally given to plaintiff to be had and retained by her only upon certain conditions relative to her future personal conduct; and that she had failed to comply with such conditions. As to this question there was evidence *pro* and *con*. And the testimony was conflicting as to the value of the property at the date of the alleged conversion thereof. There was a verdict in favor of plaintiff, assessing her damages at the sum of nine hundred dollars. In passing upon a motion for a new trial the court ordered plaintiff to remit one hundred dollars. Plaintiff thereupon entered a remittitur for said sum, and judgment was entered for her for eight hundred dollars, from which the defendant has appealed to this court.

Digitized by Google

I. The first assignment of error pertains to the refusal of the lower court to give an instruction offered by defendant. By this instruction it was sought to have the jury told, in substance, that if the latter found that the property in question was "given, loaned or presented" to plaintiff by defendant upon certain conditions, and that plaintiff had failed to fully comply with all of the same, then she could not recover.

But manifestly, the refusal of this instruction was not prejudicial error, for the reason that among the instructions given by the court of its own motion was one which sufficiently covered this very matter. It was to the effect that if the jury found that the property was given to plaintiff upon condition that she perform or do certain acts, or that she refrain from doing certain acts and things, and that plaintiff failed to comply with all of such conditions, then she was not entitled to recover. Thus this theory of the defense was fully placed before the jury, and the appellant is not entitled to complain of the refusal of this instruction.

II. The next point urged upon us is that the verdict is against "the evidence, the weight of the evidence and the law under the evidence." We need not dwell upon this. We are not permitted to disturb a judgment upon the ground that the verdict is against the weight of the evidence. There is substantial evidence to support the judgment, and that is the only question on this score that is open for review in the appellate court.

III. It is further contended that the trial court committed error in admitting certain evidence offered by the plaintiff. This pertains to certain testimony given with respect to plaintiff's private affairs and the business conducted by her and the defendant prior to the time when she received the property in question. We have examined the matters of exception pertaining to the admission of this evidence, and we are unable

Digitized by Google

to see that any reversible error inheres in the rulings of the trial court in the premises. Throughout the trial there was an effort on the part of the defendant to show that the property was given to plaintiff conditionally, and it appears that the testimony here complained of was admitted because of its tendency to support plaintiff's theory that the same was purchased with funds accumulated by the joint efforts of plaintiff and defendant, and that it was given to plaintiff unconditionally, because of her services and in recognition of her right to participate in the fruits of their joint labor.

IV. The next assignment of error is that the damages allowed were excessive. According to the testimony of respondent the value of all of the property in controversy amounted to something more than eight hundred dollars. And there was other testimony, on her behalf, by a diamond expert, which tended to show that the jewelry was worth more than the value thus placed thereon by her. On the other hand, on behalf of defendant, a jeweler testified that he sold to defendant the diamond brooch, and that at this time defendant showed him the diamond rings in question. This witness placed a considerably lower value upon the brooch and three rings than that shown by the evidence for plaintiff. None of the property in question was exhibited at the trial.

Under all the evidence in the case it would be impossible for us to say that the damages allowed are excessive. Beyond doubt there is substantial evidence tending to show that the values of the respective articles were such as to total more than the amount for which the court permitted the verdict to stand. It is argued that the evidence shows that plaintiff is not worthy of belief; and that no weight should be given to the expert testimony adduced in her behalf for the reason that this witness had not seen the diamonds

Digitized by Google

as to which he was testifying, and could only testify as to the value of stones of the weight and character described. However these matters pertaining to the credibility of the witnesses and the weight to be given to their testimony, were questions for the consideration of the jury. And if the latter's verdict could be said to be excessive because of the fact that it was greater than the total valuation placed upon the property by respondent in her own testimony, this was cured by the remittitur which the court compelled.

V. It is urged that there was "a fatal variance between the allegations in the petition and the proof, and a total failure of proof as to the market value, or value of any kind." But if there was any variance between the pleadings and the proof, appellant failed to interpose timely objections on this score, and to file an affidavit as the statute requires. No such question is therefore before us for consideration. [See Rundelmann v. Boiler Works Co., 178 Mo. App. 642 and authorities cited.] And obviously there is no merit in the contention that there was a failure of proof as to the value at the time of conversion.

As we have found no reversible error in the record the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni*, J., concur.

GEORGE A. LEONARD, Respondent, v. SECURITY BUILDING COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **JUSTICES' COURTS: Appeal by Plaintiff: Right of Plaintiff to Dismiss Suit.** A plaintiff appealing to the circuit court from a judgment rendered for defendant by a justice of the peace has the right to dismiss his cause of action, under Sec. 1930, R. S. 1909, pending a motion filed by defendant to dismiss the appeal.

Digitized by Google

2. ———: **Appeal: Suspension of Judgment.** An appeal from a judgment of a justice of the peace does not vacate the judgment altogether, but merely suspends it, pending the appeal.

3. ———: ———: **Effect of Dismissal of Suit.** Where a plaintiff appeals to the circuit court from an adverse judgment of a justice of the peace, and then exercises his right to dismiss the suit, the case is taken out of court and the judgment of the justice is thereby vacated.

4. **APPELLATE PRACTICE: Appealable Orders.** An appeal will not lie from the exercise of a plaintiff's right to voluntarily dismiss the suit after he has appealed to the circuit court from an adverse judgment of a justice of the peace; Sec. 2038, R. S. 1909, which provides that any party to the suit aggrieved by any judgment of the circuit court may appeal, not giving defendant any such right of appeal, since he cannot be said to be "aggrieved."

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey,* Judge.

APPEAL DISMISSED.

Charles E. Morrow for appellant.

(1) The plaintiff did not perfect his appeal as required by statute in that he did not give an appeal bond with good and sufficient sureties. R. S. 1909, Sec. 7568. (2) The statute authorizes an appeal to be dismissed on motion of the apellee where an appeal bond is insufficient unless the appellant enters into such a recognizance as he ought to have entered into before the allowance of the appeal. R. S. 1909, 7580; Pullis v. Pullis, 157 Mo. 565. But it is also provided by Section 7580 that no appeal allowed by a justice shall be dismissed because the recognizance is defective or insufficient if the appellant will before the motion to dismiss is determined file in the appellate court such recognizance as he ought to have entered into before the allowance of the appeal. R. S. 1909, Sec. 7580; Moston v. Stow, 91 Mo. App. 554. Therefore the court

Digitized by Google

clearly erred in not hearing defendant's motion to dismiss and in permitting the plaintiff to dismiss his cause in the face of this motion and before he had perfected his appeal as required by statute. Unless plaintiff filed a good bond his appeal should have been dismissed. (3) This court will review these errors on appeal. Moston v. Stow, 91 Mo. App. 554; Evans v. Dyke Automobile Co., 121 Mo. App. 266; R. S. 1909, Sec. 2038. (4) This case is clearly distinguished from a case where the appellant had duly perfected his appeal to the circuit court and there dismisses his cause. And this distinction has been clearly recognized by this court in the case cited and relied upon by respondent. Holdridge v. Marsh, 28 Mo. App. 283.

John A. Gilliam and *J. Butler McCormick* for respondent.

The decision permitting the dismissal was not appealable. Holdridge v. Marsh, 28 Mo. App. 283.

ALLEN, J.—This action was originally instituted before a justice of the peace, and is for personal injuries alleged to have been suffered by plaintiff through the negligence of the defendant. Upon a trial before the justice, the defendant had judgment, and the plaintiff prosecuted his appeal to the circuit court. Thereafter the defendant moved to dismiss plaintiff's appeal upon the ground of the insufficiency of the appeal bond given by plaintiff, it being averred that the surety thereon was insolvent. Thereafter, and before the court had acted upon defendant's motion to dismiss, plaintiff asked leave to dismiss his cause of action. The court permitted plaintiff so to do, and the defendant thereupon appealed to this court.

The only question involved is whether the plaintiff, after having suffered defeat in the justice court, and having appealed therefrom, had the right to dis-

Digitized by Google

miss his cause of action, during the pendency of appellant's motion to dismiss the appeal.

Appellant urges that plaintiff could not at this stage of the case dismiss his cause of action; that having been vanquished in the justice court, in a forum of his own choosing, he could not escape the consequences of the judgment against him there, and deprive the defendant of the benefit thereof, by appealing to the circuit court, and there dismissing his cause of action, in the face of a motion pending to dismiss the appeal for failure to give a sufficient appeal bond as required by statute.

In Lee v. Kaiser, 80 Mo. 431, plaintiff brought suit before a justice of the peace, and the trial, as here, resulted in a judgment for the defendant. Plaintiff appealed to the circuit court, but failed to give timely notice of the appeal in accordance with the statute then in force. The defendant moved for an affirmance of the judgment, and while this motion was pending the trial court permitted plaintiff to take a nonsuit. The Supreme Court held this to be proper, saying that the judgment of the justice had been vacated "by the appeal and dismissal of the suit," citing Turner v. Northcut, 9 Mo. 244; Moore v. Otis, 18 Mo. 118; Town of Carrollton v. Rhomberg, 78 Mo. 547.

In Holdridge v. Marsh, 28 Mo. App. 282, this court following Lee v. Kaiser, supra, held that a plaintiff who had appealed from a judgment of a justice had the right to take a voluntary nonsuit or to dismiss his action.

In Pullis v. Pullis, 157 Mo. 565, 57 S. W. 1095, upon which appellant relies, the matter under consideration was the effect of the dismissal of a defendant's appeal to the circuit court from a judgment of a justice of the peace, for failure to give an additional bond. It was held that the circuit court entered the only judgment that it had the power to enter, viz., that of the dismissal of the appeal, and that this left the

Digitized by Google

judgment of the justice of the peace in full force. The opinion in that case, however, deals with several questions not directly involved therein; and discusses the cases of Turner v. Northcut, Town of Carrollton v. Rhomberg and Lee v. Kaiser, supra. And it is pointed out that not only was it held in the latter case that the plaintiff could dismiss his action in the circuit court and thereby vacate the judgment of a justice of the peace, but that such had been held to be the privilege of a plaintiff even where the defendant had filed a counterclaim or set-off before the justice and obtained judgment thereon, upon the theory that the dismissal of plaintiff's case carried the set-off or counterclaim with it (citing cases.) It is then pointed out that a new section (1872) was added to the Revised Statutes of 1889, (now section 1878, Rev. Stat. 1909) providing that a dismissal or nonsuit should not carry with it a set-off or counterclaim of the defendant, but that the same should be proceeded with as if it were a suit instituted by the latter. A further change in the statutory provisions relative to notice of an appeal from a justice of the peace is noted, as having taken place subsequent to the decisions in Lee v. Kaiser, and the cases there cited; and it is pointed out that what is now section 7580, Revised Statutes 1909, was not referred to in those cases, though the same had been upon our statute books since 1835. And referring to the latter the court said: "Here is a distinct provision of the law which authorizes an appeal to be dismissed on motion of the appellee unless the appellant takes the steps thereby permitted. If such appeal is so dismissed, the judgment of the justice must thereby be revivified."

In the instant case, learned counsel for appellant points to this language of the Supreme Court in Pullis v. Pullis, supra, as authority for the proposition that an appeal from the judgment of a justice of the peace does not vacate such judgment; and that where an appellee moves to dismiss the appeal it is the court's

Digitized by Google

duty to hear and determine such motion, and, if the same be meritorious, to dismiss the appeal, thereby "revivifying" the judgment before the justice in appellee's favor.

But we are unable to find that the decision in Pullis v. Pullis, supra, sustains appellant's position. It is true that it is there said, and this *obiter*, that there is no authority of law for the circuit court to affirm the judgment of the justice under such circumstances, but merely to dismiss the appeal; and it is said, *arguendo*, that the *appeal* cannot vacate the judgment absolutely. for if this be so, it could not be affirmed or left in force by a dismissal of the appeal, as authorized by sections 6340 and 6344, Revised Statutes 1889 (now sections 7580 and 7584, Revised Statutes 1909). It is said, however, that it is plain that the sections just referred to "must be construed to mean that while a case appealed from a justice of the peace must be tried *de novo* in the circuit court, "*and while every plaintiff may dismiss his suit at any time before it is finally submitted to the jury or court*, still he cannot carry with his dismissal the defendant's set-off or counterclaim," etc. (Italics ours.)

And it is also said that the cases of Lee v. Kaiser, and Turner v. Northcut, supra, must be read in the light of the subsequent legislation referred to, and which it is said "has taken away much of the foundation upon which they rested." Nevertheless it is quite apparent that the real point of decision in Lee v. Kaiser is not disapproved. It is not expressly overruled in the Pullis case, but on the contrary the latter distinctly recognizes "that every plaintiff may dismiss his suit at any time before it is finally submitted to the jury or court."

In fact, the real question with which we are here concerned was not involved in the Pullis case. The last authoritative ruling of the Supreme Court on the question is to be found in Lee v. Kaiser, supra. And

Digitized by Google

although since the latter decision there have been certain changes in the statutes relative to appeals from a justice of the peace, referred to in the Pullis case, such changes do not appear to affect the question of the right of a plaintiff to dismiss his case. It is true, as seen in the Pullis case, supra, that it is no longer held that an appeal from the judgment of a justice of the peace *vacates the latter altogether* as has been said in some of the cases (see Turner v. Northcut, supra, l. c. 253; Hammel v. Weiss, 54 Mo. App. l. c. 16; also state ex rel. v. Mosmon, 112 Mo. App. l. c. 547, 87 S. W. 75), but that the judgment of the justice remains suspended pending the outcome of the appeal. [See also Sublette v. Ry. Co., 96 Mo. App. 120, 122, 69 S. W. 745.]

From the language of the Supreme Court in Pullis v. Pullis, supra, it appears that a *dismissal of the appeal* "revivifies" the judgment of a justice. This may be quite true, without in any manner affecting the real question before us. It is immaterial that the judgment may thus be revived and again become in force. But unless it is so revived by the dismissal of the appeal it never again acquires any force; for the case will otherwise proceed *de novo* in the circuit court as though it had been originally instituted there, and the circuit court will ultimately enter its judgment therein, unless the plaintiff should exercise his right to dismiss the cause or take a nonsuit, in which event the case is taken out of court and the judgment of the justice thereby vacated.

In Estate of Howard v. Strode, 128 Mo. App. l. c. 495, 106 S. W. 116, in treating of the right of a claimant in the probate court, who had been there defeated, to dismiss the case while pending on her appeal in the circuit court, this court referred to Lee v. Kaiser, supra, as authority for the proposition that a plaintiff may dismiss his action in the circuit court thereby "vacating and annulling" a judgment of a justice of

Digitized by Google

the peace against him; this being there said for the reason that "the practice on appeal from a probate court is *mutatis mutandis,* like that on appeal from a justice." And the Pullis case, supra, was not referred to as having affected the decision in Lee v. Kaiser.

The right of a plaintiff to dismiss his suit, or take a voluntary nonsuit therein, "at any time before the same is finally submitted to the jury or to the court sitting as a jury, or to the court," is allowed him under section 1980, Revised Statutes 1909.

It is urged that an unreasonable hardship results from permitting a plaintiff to sue in a justice court, and then, when defeated there, to appeal his case to the circuit court, dismiss it, and begin over again, thereby depriving a defendant of the benefit of his judgment. This results, however, from the fact that the cause is proceeded with *de novo* in the circuit court, as though originally instituted there (Sec. 7579, R. S. 1909), and the right of a plaintiff to dismiss or take a nonsuit, at any time before final submission thereof, under section 1980, supra.

It is said that the plaintiff did not perfect his appeal to the circuit court as required by statute, in that he did not give an appeal bond with good and sufficient surety. But this question is in no manner before us. The lower court was not given an opportunity to pass thereupon, because of plaintiff's dismissal of the action.

In this view it will be further seen that no appeal will lie from the exercise of a plaintiff's right to voluntarily dismiss or take a nonsuit. Certainly the plaintiff cannot appeal therefrom. And it does not appear that the statute gives to the defendant any such right. [See Sec. 2038, R. S. 1909.] Nor can he be said to be aggrieved thereby, within the meaning of the statute allowing appeals. And in Holdridge v. Marsh, supra, this court distinctly held that a defendant had no right of appeal from the action of the circuit court in

Digitized by Google

permitting a plaintiff to dismiss the cause, which, as here, was pending upon appeal from a justice of the peace.

It results therefore that this appeal must be dismissed, and it is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

OLIVE STREET BANK OF ST. LOUIS, Respondent, v. G. M. PHILLIPS, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **BILLS AND NOTES: Pleading: Variance: Failure of Proof.** The petition counted on a note bearing interest from date at eight per cent per annum until paid. The note introduced in evidence was of the same date and for the same amount as described in the petition, but provided for interest at eight per cent from date until maturity and at eight per cent from maturity until paid, payable monthly, and that if interest was not paid when due, it should become principal and bear the same interest. *Held*, that the note introduced in evidence was not so utterly inconsistent with the note alleged as to disprove the cause of action alleged or amount to a total failure of proof, within Sec. 2021, R. S. 1909.

2. **PLEADING: Variance: Mode of Objecting.** The party complaining of a variance between the pleading and the proof must not only interpose a timely and specific objection to the introduction of the evidence offered, but must file an affidavit of surprise, as required by Sec. 1846, R. S. 1909, and if he fails to do so, it is too late to complain in the appellate court.

3. **BILLS AND NOTES: Alteration: Sufficiency of Evidence.** In an action on a promissory note, evidence for plaintiff to overcome defendant's proof as to alteration of the note *held* to be substantial and sufficient to make the alleged alteration after delivery a question for the trial court sitting as a jury.

4. **APPELLATE PRACTICE: Conclusiveness of Trial Court's Finding.** In an action at law tried by the court, where no instructions are given or refused, the finding will not be disturbed, on appeal, if it can be sustained on any theory supported by the evidence.

Digitized by Google

Appeal from St. Louis City Circuit Court.—*Hon. W. B. Homer,* Judge.

AFFIRMED.

Fauntleroy, Cullen & Hay and *Barclay & Orthwein* for appellant.

The note offered in evidence is entirely different from the note declared upon in the following particulars: (1) It is payable at Olive Street Bank; (2) The interest is payable monthly; (3) The note is a compound interest note. And under all the authorities, such a note does not support a petition drawn on a simple interest note with interest payable annually—and the principal note made payable at a stated place. Faulkner v. Faulkner, 73 Mo. 335; Construction Co. v. Iron Works, 154 Mo. 153; Gray v. Race, 51 Mo. App. 553; Cole v. Armour, 154 Mo. 333; Mfg. Co. v. School District, 54 Mo. App. 371.

Wilfley, Wilfley, McIntyre & Nardin for respondent.

(1) There is nothing before this court for review. A jury having been waived, no instructions having been asked or given, this court will not disturb the finding of facts made by the trial court, and this court will presume the proper application of the law to the facts by the trial court. Rice, Stix & Co. v. McClure & Harper, 74 Mo. App. 383; Mauch v. Hornback, 109 Mo. App. 624; Gibson v. Bailey Co., 114 Mo. App. 357; Bank v. Fiske, 135 Mo. App. 8. (2) There was no variance between the pleading and the proof under the law of this State. Secs. 1846 and 1847, R. S. 1909; Batson v. Clark, 37 Mo. 31; Bank v. Miller, 79 Mo. 275; Barrows v. Million, 43 Mo. App. 79; Harison v. Lakenan, 189 Mo. 581; Chouquette v. Railroad, 152 Mo. 257; Fisher & Co. R. E. v. Realty Co., 159 Mo. 562.

Digitized by Google

(3) The finding of the court, that there was no alteration in the note sued on, is celarly supported by the law of this State, as it now stands, even if it were before this court for review, which it is not, under authorities cited under point I. Secs. 10094, 10095, R. S. 1909.

ALLEN, J.—This is a suit upon a promissory note given plaintiff bank by defendant for money loaned him and placed to his credit at the bank. The instrument as offered in evidence was in the following form:

"$1000. "St. Louis, Mo., Feb. 14, 1908.

"Six months *monthly* after date I promise to pay to the order of Olive Street Bank .... at the office of the

OLIVE STREET BANK

of St. Louis,

One Thousand ..... DOLLARS, For value received, with interest at the rate of 8 per cent per annum from date until maturity, and at *eight* per cent from maturity until paid; payable *monthly*, annually. If the interest is not paid when due, it shall become as principal and bear the same rate of interest.

"G. M. PHILLIPS,

"Commercial Bldg."

The petition charged "that defendant, on the 14th day of February, 1908, by his negotiable promissory note of that date, by him duly executed and delivered, promised for value received to pay to plaintiff, six months from said 14th day of February, 1908, aforesaid, the sum of one thousand dollars, with interest at the rate of 8 per cent per annum until paid, from and after the date thereof."

The answer, which it is said was verified by affidavit, denied the execution of the note "described in plaintiff's petition, or any promissory note, in the

Digitized by Google

terms, or to the effect, as is described in the petition of said plaintiff, in this action;" and further contained a general denial.

A reply was field, averring that whatever changes, if any, were made in the note sued on, were made with the knowledge and consent of defendant; and that if any alterations were made therein after the execution thereof by defendant, the same were fully ratified and approved by him.

The defense interposed pertains to alterations claimed to have been made in the note, after delivery, and without the knowledge and consent of the defendant; it being contended that such alterations were material and vitiated the instrument. It is asserted by defendant that the words "monthly" and "eight," which we have underscored in the note as set out above, were inserted in such places therein, and the word "annually" stricken out in the interest clause thereof, after delivery, and without defendant's knowledge and consent.

I. The first point raised, however, and for which it is said the judgment should be reversed, is that the note offered in evidence is an entirely different note from that declared upon in the petition; and that as to the cause of action contained in the petition, there was a total failure of proof. This assignment of error is predicated upon the fact that the petition declares upon a note bearing "interest at the rate of 8 per cent per annum until paid, from and after the date thereof;" whereas, the note offered in evidence provides "for interest at the rate of eight per cent per annum from date until maturity, at eight per cent from maturity until paid; payable monthly," and provides that "if the interest is not paid when due it shall become as principal and bear the same rate of interest."

But we are not persuaded that there was a total failure of proof of the cause of action alleged, i. e., a

Digitized by Google

total failure to prove the execution of the note declared upon in the petition. It is not a case where "the allegation of a cause of action . . . is unproved, not in some particular or particulars only, but in its entire scope and meaning," within the purview of section 2021, Revised Statutes 1909. The petition described a note of defendant such as was offered in evidence, so far as concerns the date, the amount thereof and the time when payable, alleging that the note bore interest at the rate of 8 per cent per annum from its date until paid. Considering that the note is otherwise fully identified in the petition, the allegation that the note bore interest at the rate of eight per cent per annum, from date until paid, cannot be said to make the note declared upon so utterly inconsistent with the note offered in evidence that the latter should be held to disprove the cause of action alleged, or amount to a total failure of proof thereof.

At most, the matter here complained of can only be said to be a variance between the *allegata* and the *probata*. And it is well settled that where a variance is claimed, the party complaining thereof must not only interpose timely and specific objection to the introduction of the evidence offered, but that the objecting party must proceed in the manner provided by section 1846, Revised Statutes 1909, otherwise he will not be heard to complain on this score. This section provides for the filing of an affidavit of surprise; and if a party fails to avail himself of this section it is too late to complain in the appellate court. [See Fisher Co., etc. v. Realty Company, 159 Mo. 562, 62 S. W. 443; Rundelman v. Boiler Works Co., 178 Mo. App. 642, and authorities there cited.] The appellant here filed no such affidavit and is now in no position to ask for a reversal of the judgment below upon the ground of a variance between the pleadings and proof, should any exist.

Digitized by Google

II. It is earnestly insisted by appellant that it was conclusively shown that the note was altered after it left the maker's hands, without the latter's knowledge and consent, by inserting the word "monthly," which appeared in pencil after the words "six months," the word "eight" in the interest clause of the note, and also by striking out the word "annually" in the interest clause thereof and inserting the word "monthly" in its stead. And it is said that the evidence adduced on behalf of plaintiff to overcome defendant's proof on this score was so slight as to be but "a mere scintilla of evidence," and such as could not be termed substantial evidence at all. We are unable to accede to this however. It is true that there was sufficient evidence on behalf of defendant tending to prove that the note was altered in the manner aforesaid, after its execution, and without defendant's knowledge and consent. It appears that, with the exception of the name of the payee, all of the written portions of the note, i. e., such as were written in the blank spaces of the printed form, as defendant claims the note was originally drawn, were in defendant's own handwriting. The tetimony was conflicting with respect to the alleged insertions. It is unnecessary, however, for us to review in detail the evidence respecting the issues pertaining to the alleged alteration of the note. Though there was substantial evidence on this score for the defense, there was likewise substantial evidence *contra* in behalf of plaintiff. One witness, Dr. Pickney French, president of plaintiff bank, testified that when he first saw the note, on the day when it was executed, and before delivery, it was just as it appeared in evidence, excepting a marginal number thereon, the words "Commercial Bldg." appearing under the maker's name, and that the word "monthly," in pencil, after the words "six months," did not appear upon the note at that time. And another witness, Dr. Ament, testified that he took the note from Dr. French's private office

Digitized by Google

to the defendant, who signed it in the presence of this witness; that, at the time of the execution thereof, defendant stated that he desired to pay the note in monthly installments, as it would be more convenient, and that defendant thereupon "marked it payable monthly." This alone was substantial evidence sufficient to make the question of the alleged alteration of the note, after delivery, one to be determined by the lower court sitting as a jury.

As the cause was tried below before the court without a jury, a jury having been waived, and no declarations of law were asked by either party and none given, if there is any substantial evidence upon which to base the judgment below, and if the latter can be held to be correct upon any theory whatsoever, it is our duty to sustain it. It was for the court, thus sitting as a jury, to determine the controverted question of fact presented to it; and we must presume that the court made a proper application of the law to the facts. The court evidently found against defendant upon his claim that the note had been altered after it left his hands. At any rate there was substantial evidence to justify such finding, and hence in this state of the record the judgment is conclusive upon us.

In this view, it is unnecessary to discuss the question whether the changes alleged to have been made in the note were material alterations, under the provisions of the Negotiable Instruments Law, which was in effect at the time the note was executed.

For the reasons given above the judgment of the circuit court should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

Digitized by Google

ANTONY SUSTAR, Respondent, v. BAMBRICK BROTHERS CONSTRUCTION COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **MASTER AND SERVANT: Injury to Servant: Incompetent Fellow Servant: Liability of Master.** In order to cast liability on the master for an injury to a servant, caused by the act of a fellow servant, on the ground that the fellow servant was habitually incompetent or negligent, the general rule is, that it must appear that the negligent servant was habitually incompetent or negligent, and that such fact was known to the master, or by ordinary care could have been known to him, and that after having such actual or constructive knowledge, he retained the incompetent or negligent servant in his employ.

2. ———: ———: ———: **Sufficiency of Evidence.** In an action for injuries to a servant working in a sewer trench, as a result of the negligence of the signalman in charge of the sewer machine in failing to see that the buckets were hoisted to a sufficient height to clear the crossbeams of the machinery, by which one of them was dumped and the stone it contained precipitated on plaintiff below, evidence *held* to require submission to the jury of the question of the incompetency of the signalman and the master's negligence in keeping him in such a position, when it knew, or by the exercise of ordinary care could have known, that he was incompetent. [REYNOLDS, P. J., dissents.]

3. ———: ———: ———: **Instructions.** In an action for injuries to a servant working in a sewer trench. as a result of the negligence of the signalman in charge of the sewer machine in failing to see that the buckets were hoisted to a sufficient height to clear the crossbeams of the machinery, by which one of them was dumped and the stone it contained precipitated on plaintiff below, an instruction that if defendant negligently employed and retained an incompetent and unskilled signalman who was not reasonably competent and fit to perform his duties, and because of such incompetency he caused the carriage to be started and moved along the track while one of the buckets was hanging so low that it struck a crossbeam and was caused to tip and spill a rock on plaintiff, and defendant knew, or by ordinary care would have known, of the unfitness and incompetency of the signalman and the danger to

Digitized by Google

plaintiff by reason thereof, the verdict should be for plaintiff, was not objectionable, either on the ground that the jury were not required to find that the signalman actually signaled the engineer to start the carriage when the buckets had not been raised to the proper height, or as assuming that the signalman was incompetent.

4. ———: ———: ———: **Instructions.** In an action for injuries to a servant working in a sewer trench, as a result of the negligence of the signalman in charge of the sewer machine in failing to see that the buckets were hoisted to a sufficient height to clear the crossbeams of the machinery, by which one of them was dumped and the stone it contained precipitated on plaintiff below, the court instructed that if defendant operated a carriage on a track extending along the top of the sewer, and large buckets were conveyed along the track, by means of cables, over the place where plaintiff was required to stand, and the buckets, "while so customarily operated," were hanging so low that they came in contact with a crossbeam, and one of the buckets was tipped and a rock spilled out, which struck plaintiff, and that defendant had adopted and used at said time a plan which was not reasonably safe, in that the buckets were likely to tilt and swing and strike the crossbeam and to spill their contents, and that defendant knew, or by ordinary care should have known, that the plan was not reasonably safe, and such negligence, if any, directly caused the injury, plaintiff could recover. *Held*, that the words "while so customarily operated" should not be construed to mean that the jury should find that the customary or normal way of handling the carriage and buckets adopted by defendant was to move the carriage when the buckets were so low that they came in contact with crossbeams, but should be construed to mean that jury should find that, on the occasion in question, the buckets were hanging so low that they came in contact with the beams; and hence the instruction was not vulnerable to the objection that it was bad because there was no evidence tending to prove that the apparatus was customarily operated in a negligent manner.

5. ———: ———: **Defective Appliances: Unsafe Plan of Operation.** A sewer machine consisting of a carriage carrying buckets was operated upon wheels along an elevated track extending along and above the top of the sewer. This track was supported by a trestle, which stood upon timbers laid across the sewer. The trench was dug by filling large buckets therein, which were hoisted and conveyed by the carriage along the track and dumped. The rails of the elevated track were held in place by crossbeams. The greatest possible clearance between the buckets and the crossbeams was a foot or fourteen

Digitized by Google

inches and the buckets were ordinarily stopped at a height of only from four to six inches above the crossbeams. While the buckets were ascending rather rapidly, it was necessary for the signalman to cause them to be stopped and caught by a ratchet arrangement before they ascended high enough to forcibly strike or interfere with the machinery above and when they were sufficiently high to clear the crossbeams. The ratchet arrangement was such that, if one of the dogs missed a tooth on the ratchet wheel, the bucket would drop back about eight inches. The buckets were suspended by cables attached to the bails thereof, and the entire operation was a rapid one. *Held*, that this method of operation was such that danger inhered therein with respect to the buckets striking the crossbeams and tilting so as to cause them to spill their contents on the heads of the unprotected workmen beneath; and hence a finding that the plan of operation was not a reasonably safe one was justified.

6. ———: ———: **Unsafe Plan of Operation: Incompetency of Fellow Servant: Consistency.** In an action for injuries to a servant working in a sewer trench, caused by a bucket, which was being elevated by means of a cable, striking a crossbeam and tilting over and precipitating stone it contained on plaintiff below, *held* that a theory of negligence that the servant in charge of the hoisting was negligent in failing to see that the bucket was hoisted to a sufficient height to clear the crossbeam was not inconsistent with a theory that the master was negligent in adopting a plan of operation which was not reasonably safe.

7. ———: ———: **Defective Appliances: Unsafe Plan of Operation: Instructions.** In an action for injuries to a servant working in a sewer trench, caused by a bucket, which was being elevated by means of a cable, striking a crossbeam and tilting over and precipitating stone it contained on plaintiff below, the court instructed the jury that if they believed that the conveying machine was negligently constructed, arranged and used, in that the space between the bottoms of the buckets and the crossbeams was so small that there was immediate danger, in operating the buckets, of the lower ends thereof striking the crossbeams and spilling their contents, and that defendant knew, or by the exercise of ordinary care should have known, thereof, and that it was dangerous to plaintiff, while engaged in his work, for the buckets to be so operated, and that the buckets were apt to swing, tilt and strike the cross-beams and injure plaintiff, and that such negligence of defendant, if any, directly caused one of the buckets to strike a crossbeam and tilt and spill the rock and injure plaintiff,

Digitized by Google

then their verdict should be for plaintiff. *Held*, that this instruction does not proceed upon the theory that defendant was negligent in using the type of machine used, but proceeds upon the theory that the machinery was negligently arranged and placed, in that, as the parts were then correlated and operated, the space between the bottom of the buckets was too small for the safe operation of the machine, and that this was the cause of the injury; and hence it is not vulnerable to the objection that it was not supported by the evidence, in that the testimony showed that the machine was of standard type.

[REYNOLDS, P. J., *dissents.*]

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

T. J. Rowe and *Seddon & Holland* for appellant.

(1) The court erred in refusing to give the peremptory instruction asked by appellant at the close of all the evidence. Brands v. Car Co., 213 Mo. 698; Steinhauser v. Spraul, 127 Mo. 562; Chrismer v. Tel. Co., 194 Mo. 189; Epperson v. Tel. Co., 155 Mo. 346. (2) The court erred in giving instruction No. 1 at the instance of respondent. Said instruction is set out in full under heading II of Argument, infra. Lukamiski v. Steel Co., 142 S. W. 1097; Gorham v. Railroad, 113 Mo. 408. (3) The court erred in giving instruction No. 2 at the instance of respondent. Said instruction is set out in full under heading III of Argument, infra. Brands v. Car Co., 213 Mo. 698; Henschen v. Railroad, 56 Mo. 289; Price v. Railroad, 77 Mo. 508; Smith v. Railroad, 125 Mo. App. 120; Walleck v. Transit Co., 123 Mo. App. 160. (4) The court erred in giving instruction No. 3 at the instance of respondent. See authorities cited under heading III. (5) The court erred in refusing to give instruction B at the instance of appellant. Chrismer v. Tel. Co., 194 Mo. 189. (6) The court erred in refusing to give instruction F at the in-

Digitized by Google

stance of appellant. Said instruction is set out in full under heading VI of Argument, infra.

Hall & Dame for respondent.

(1) It was not error to refuse appellant's peremptory instruction offered at the close of the whole case. (a) All facts essential to the charge of employing and retaining an incompetent and inexperienced signal man were in the proof. Tucker v. Tel. Co., 132 Mo. App. 418; Allen v. Lumber Co., 157 S. W. 661. (b) There was evidence to go to the jury on the charge that the method or plan was negligent. Miles v. Coal & Coke Co., 157 S. W. 867. (c) The charge of negligently constructed, arranged and used machine was sustained by the evidence. Austin v. Shoe Co., 158 S. W. 709; Schiller v. Breweries Co., 156 Mo. App. 569; Brunke v. Tel. Co., 115 Mo. App. 38. (2) Respondent's first instruction on ground of incompetent signal man is not erroneous. (a) Facts as stated in the instruction constitute negligence in law. Tucker v. Tel. Co., 132 Mo. App. 418; Allen v. Lumber Co., 157 S. W. 666. (b) All the elements of actionable negligence are present and the law of the facts was properly declared, and if it could be claimed that there is any defect in said instruction, it is cured by instructions numbered V, VI, VII, and IX, given at instance of appellant. Anderson v. Union T. Co., 161 Mo. 411; Gordon v. Burris, 153 Mo. 223; Pray v. Union Cas. Co., 73 Mo. App. 679. (3) There is no error in respondent's instruction No. II, on charge of negligence in reference to unsafe plan. (a) It was not inconsistent with respondent's instruction No. I. Radtke v. Basket & Box Co., 229 Mo. 16. (b) It is supported by the evidence, and proper in form. (c) After verdict the allegations of negligence will, if they may, without violence to reason, be reconciled and harmonized; and should be liberally construed (Sec. 1831, R.

Digitized by Google

S. 1909). The verdict is for the right party. Sharp v. Railroad, 213 Mo. 525; Gaedes v. Railroad, 143 S. W. 565, 161 Mo. App. 225; Long v. Coal & Iron Co., 233 Mo. 713; Kelley v. Railroad, 153 Mo. App. 114; Barry v. Railroad, 98 Mo. 73. (d) Appellant did not file any motion to elect, and its claim now after verdict for first time that said first and second grounds are inconsistent, comes too late. (e) The method or plan in actual use was adopted by defendant, and that method or plan was obviously unsafe. Brubaker v. Electric Light Co., 130 Mo. App. 439. (4) Instruction No. III given at instance of respondent, on charge of negligence in reference to negligently constructed, used and arranged machine was proper. There was direct and substantial evidence and evidence from which the jury might infer that the machine as constructed and used was not reasonably safe. (a) The question whether the paticular machinery provided by the master is proper and suitable is to be determined by the actual condition of its operation and not by comparing it with other machinery. Schiller v. Breweries Co., 156 Mo. App. 569; Austin v. Shoe Co., 158 S. W. 709. (b) Said instruction is not inconsistent with instruction No. 1. The allegations of a petition should be liberally construed with a view to substantial justice, being attacked after verdict for first time. Sec. 1831, R. S. 1909; Sharp v. Railroad, 213 Mo. 525; Gaedes v. Railroad, 161 Mo. App. 225; Long v. Coal & Iron Co., 233 Mo. 73. (5) The court did not err in refusing to give instruction "B" offered by appellant, because: There was abundant evidence of the unsafe method or plan. As it was proper to give instruction No. II for respondent on charge of negligence of unsafe method or plan, discussed under point III of this brief, then instruction "B" for appellant was properly refused. See authorities under point III, supra. (6) The court did not err in refusing to give instruction No. "F" offered by appellant, that is to instruct the

Digitized by Google

jury that respondent was not entitled to recover on the charge of incompetent signal man. Refusal to give said instruction was proper, because there was abundant evidence to support said charge of negligence. See authorities under point II (a), supra.

ALLEN, J.—This is an action by plaintiff to recover for personal injuries received by him, while engaged as a servant of defendant, alleged to have been sustained through the negligence of the latter. Plaintiff recovered and the defendant prosecutes the appeal.

On July 24, 1911, plaintiff was in the employ of defendant, assisting in the construction of a certain sewer in the city of St. Louis. At the time of his injury, he was working in a trench which was being dug by means of the operation of what is known as a sewer machine. The latter consisted of a certain "carriage" carrying buckets, and was operated upon wheels along an elevated track extending along and above the top of the sewer, some fifteen feet or more above plaintiff. This track was supported by a sort of trestle which stood upon timbers laid across the sewer. The trestle and track extended for some distance along the sewer; and the trench was dug by filling large buckets therein, which were hoisted and conveyed by the carriage along the elevated track and dumped. The rails of the elevated track were held in place by certain crossbeams, the upper edges thereof being a little lower than the tops of the rails, in order that the flanges of the wheels of the carriage would not strike them.

On the day plaintiff received his injuries he was working at certain concrete work which was being placed in a portion of the sewer which had been dug. The trench was being dug, ahead of him, and the buckets containing the material hoisted therefrom were being carried along from time to time by the carriage

Digitized by Google

directly over the place where plaintiff was working. Upon the occasion in question the bottom of one of these buckets, containing a large rock weighing it is said some eighty or ninety pounds, was permitted to strike one of the crossbeams of the elevated track, causing this rock to fall from the bucket, and which, after striking one of the crossbeams, fell upon plaintiff while engaged in his work below, striking him upon the head and inflicting very serious and permanent injuries.

To an understanding of the assignments of negligence upon which the case was tried some further explanation of the operation of the sewer machine is necessary. The carriage was operated along the elevated track, and the buckets were raised and lowered, by an engine situated some distance down the track, and which performed both of these operations by means of cables running therefrom to the carriage. A signal man stood upon the platform of the carriage and gave signals to the engineer with respect to the hoisting of the buckets, the stopping of the same at the proper height and the operation of the carriage along the track. When the buckets were filled in the trench below, a signal was given to the engineer to raise them. When they had been raised to the proper height it was the duty of the signal man to signal the engineer in order to stop their upward movement. It seems that there was a ratchet arrangement provided, to prevent the buckets from being raised too high and likewise from falling back after they had been elevated. After the signal man had signalled the engineer to check the upward movement of the buckets, it was the duty of the former to throw a lever to cause what is called the "dogs" to catch in the teeth of the ratchet wheels to prevent the buckets from ascending higher or from falling back. Then it was his duty to signal the engineer to release a certain brake and convey the carriage along the track in order to dump the buckets.

Digitized by Google

There was expert testimony to the effect that the total possible clearance that could be arranged to be had between the bottom of the buckets and the crossbeams was something like two feet; though there was testimony that as this particular machine was then "rigged up" and operated the largest possible clearance was a foot or fourteen inches. It appears that each of these large buckets had a bail, to which was welded a strip of iron with a holt in it to receive a hook which was fastened to the cable. It seems that defendant was using eight of these buckets, of almost exactly the same size, two of them being hoisted or lowered at a time, and the others being down in the trench to be filled. It appears that the hooks for lifting the buckets were attached to the cable by means of clamps and that the height to which the buckets might be raised above the crossbeams depended somewhat upon the location of these clamps. There was also testimony, by an expert witness of defendant, that the ratchet arrangement above mentioned, to hold the buckets in place after they had been elevated, was such that if one of the "dogs" should just miss one "tooth" of the ratchet the bucket would drop back a distance of about eight inches before the "dog" would catch the next "tooth" and sustain it.

The cause was tried upon three of the assignments of negligence charged in the petition, and it is unnecessary to notice the others therein contained.

One assignment of negligence is that the defendant negligently employed and retained an incompetent and unskilled signal man, whose duty it was to signal the engineer in lifting and conveying the buckets above mentioned. And it is charged that on the occasion in question the said signal man signalled the engineer to cause a bucket to be started along the track, before it had been elevated to its proper position to be so moved, and when it was hanging so low that it

Digitized by Google

would strike and come in contact with the crossbeams, whereby the rock was caused to fall and injure plaintiff. And it is charged that the signal man performing said duties at the time was not reasonably fit and qualified to perform the same; and that defendant negligently retained him in its employ, when defendant knew, or by the exercise of ordinary care would have known, of his unfitness and incompetency.

Another assignment of negligence is to the effect that the method or plan which defendant was pursuing at the time of plaintiff's injury, in conveying the buckets along the track, and over the sewer, was not a reasonably safe one; and that it was not reasonably safe for plaintiff to work in the sewer while such buckets were being so conveyed along and over the same, for the reason that they, as so operated, were likely to tilt and swing violently and to strike a crossbeam and spill their contents. And that defendant knew, or by the exercise of ordinary care would have known that such plan was not reasonably safe.

A third assignment of negligence is that the conveying machine, above mentioned, then used and operated by defendant, "was so negligently constructed, arranged and used, and that the said crossbeams were so negligently fixed, placed and maintained by defendant, that the space between the bottom of said buckets and the said braces, when said buckets were conveyed along said track, was too small, so that there was great danger, in the swinging or tilting of said buckets, of the bottom or lower end of said buckets striking the said braces and spilling the contents and injuring plaintiff." And it is charged that defendant knew, or by the exercise of ordinary care would have known, thereof.

The answer, after the court had sustained a motion directed to a part thereof, and as it stood when the cause went to trial, was a general denial.

Digitized by Google

The evidence shows that at the time of plaintiff's injury one Fred Fisher was acting as defendant's signal man on the carriage above mentioned. Just how long he had been performing such duties is a question as to which the evidence is conflicting. On behalf of plaintiff there was testimony of witnesses working in and about the sewer to the effect that Fisher had acted as signal man for a period of only two or three days prior to plaintiff's injury. One Harbison had been defendant's regular signal man, and Fisher had been employed as a common laborer digging and working in the trench. It appears, however, that Harbison gave Fisher some instructions as to giving the signals, and that for at least some short time prior to the occasion in question the latter had been acting in this capacity. Defendant's testimony went to show that Fisher had first given signals something like three months prior to the time of the accident; that he had relieved Harbison from time to time, in the meantime, and that in all he had acted in this capacity for a period amounting to perhaps fifteen days. But that, as has been said, was a matter in dispute; for the testimony of witnesses for plaintiff, who were present during the period in question, was to the effect that Fisher had only begun to give signals two or three days before the date upon which plaintiff was injured.

On behalf of plaintiff there was considerable testimony to the effect that so long as Harbison, the regular signal man, was giving the signals, the buckets were raised and held to such a height that the bottoms thereof would be from four to six inches above the crossbeams above mentioned, as they were being conveyed down the elevated track; but that during all of the time that Fisher acted as signal man, the buckets were stopped at such a height that there was but a very small space between them and the crossbeams, as they moved along the track; that they were frequently operated but half an inch, an inch, or two

Digitized by Google

inches above the crossbeams, though sometimes the distance was three or four inches; and that the buckets actually touched and scraped the beams a number of times.

It was shown that, during the time while Fisher was acting as signal man, defendant's foreman was on the ground supervising and directing the work, and in a position to see and know what the signal man was doing and how the buckets were being elevated and conveyed.

And it was shown that at the time of plaintiff's injury defendant was excavating rock from the trench ahead of where plaintiff was working, and conveying the same in these buckets above plaintiff. And there was testimony to the effect that as two of the buckets were being hoisted Fisher prematurely signalled the engineer to convey the carriage and buckets down the track, at a time when one of the buckets was hanging so low that it struck a crossbeam of the track above plaintiff, causing the bucket to swing and the rock to fall therefrom upon plaintiff and injure him.

I. Appellant urged that its demurrer to the evidence should have been sustained. But we think that the demurrer was well ruled. It is true that in order to cast liability upon the master for the act of a fellow servant of the plaintiff, upon the ground of the incompetency or habitual negligence of such fellow servant, the general rule is that it must appear that the latter was habitually incompetent or negligent, and that such habitual incompetency or negligence of the servant was known to the defendant, or by the exercise of ordinary care could have been known to him; and that the master after having such actual or constructive knowledge thereof retained the incompetent or negligent servant in his employ. [See Allen v. Lumber Co., 171 Mo. App. 492; Tucker v. Telephone Co., 132 Mo. App. 418, 112 S. W. 6.] Though it has been

Digitized by Google

held that "whether one act of negligence will establish incompetency, or not, depends upon the character of the act;" that an act "may be such as, *per se,* to prove incompetency." [See McDermott v. Ry. Co., 87 Mo. l. c. 295.] But we think that there was ample evidence tending to establish a state of facts which, if true, brings plaintiff's case within the general doctrine above stated.

It quite clearly appears that Fisher, who was acting as signal man at the time of plaintiff's injury, had previously been performing the work of an ordinary laborer in the trench, and that the defendant had taken him from this work and placed him in charge of the operation of its sewer machine, as signal man. The testimony is conflicting as to how long he had been performing the latter services before plaintiff's injury. Be this as it may, the testimony of plaintiff's witnesses is to the effect that during *all* of the time that Fisher was acting in this capacity the buckets were not elevated to the height which they had been during the time that Harbison, the regular signal man, was in charge of the machine, but that during all such period it was customary for Fisher to so give his signals that the buckets, as they were conveyed by the carriage down the track, would ordinarily clear the crossbeams by a very narrow margin—frequently by as little as half an inch, one, two or three inches; and that during this time, the buckets were seen to actually touch or scrape such crossbeams quite a number of times, and which may be readily inferred to have been due to the manner of giving the signal.

During all of this time the defendant had a foreman at the place in charge of the work; and obviously what others saw respecting the habitual operation of the machine he could and should have seen and known. Under such circumstances as appear here in evidence, ordinary care on the part of the master, or his representative, would require that such matters be observed.

Digitized by Google

Undoubtedly the work was one fraught with much danger to those working in the trench below, over whose heads the machine was being operated, and especially when rock was being excavated and conveyed in swinging buckets which might be tipped and their contents precipitated below.

From the evidence it appears that the height to which the buckets were raised prior to being started upon their way down the track depended much upon the time of signalling the engineer and the operation of the lever designed to cause the buckets to be held in position by the ratchets. And it further appears that the work of the signal man was not such a simple task as appellant would have us believe; but one which required a certain amount of skill and experience in order to safely operate the mechanism in question, under the circumstances appearing. It seems that the buckets and the carriage were operated with considerable rapidity; that the buckets were raised rather rapidly until the engineer was signalled as they neared the point where they were to be held suspended; and that when they were there caught and held in position, the carriage would begin to move on its way. Indeed it appears that frequently there was no stop or interval between these two movements, although it seems that the proper and safe plan of operation was to see that the buckets were securely fastened in position before moving the carriage. At any rate the entire operation was a rapid one; and it is said that the carriage moved along the track at or about the speed that a horse would trot.

In view of all of the facts appearing in evidence as to the nature of the work, the duties of the signal man, the danger involved, and the evidence adduced touching the manner in which Fisher performed the duties of such position during the time that he was employed in that capacity, it cannot be doubted that there was substantial evidence tending to show that

Digitized by Google

the latter was not sufficiently competent and qualified—did not possess the requisite skill—for the performance of such duties; and that the master either knew this, or at least had ample opportunity, by the exercise of ordinary care, to have discovered and known the same, as was its duty to do. Indeed plaintiff's evidence tends with much force to show that defendant's said servant, who it seems was but an ordinary laborer was totally unfit to be entrusted with duties upon the proper performance of which depended the lives and safety of men working directly below in the trench, without protection from falling objects, and that defendant knew or should have known thereof.

We think that the plaintiff made a sufficient showing upon this assignment of negligence alone to take his case to the jury, and therefore, so far as concerns the ruling on the demurrer to the evidence, it is unnecessary to consider the other charges of negligence upon which the case was tried; but these will be touched upon in considering the assignments of error made by appellant with respect to the instructions.

II. Error is assigned with respect to the giving of instruction No. 1 for plaintiff, which told the jury that if they found that defendant negligently employed and retained in its employ at said time and place an incompetent and unskilled signal man, who was not reasonably fit and competent to perform such duties, and that because of such incompetency and unfitness, if any, he caused the carriage to be started and moved along the track while one of the buckets was hanging so low that it struck a certain crossbeam, and which was thereby caused to tip and spill out a heavy rock, etc., whereby plaintiff was injured; and that defendant knew, or by the exercise of ordinary care would have known, of the unfitness and incompetency of said signal man and of the danger to plaintiff by reason

Digitized by Google

thereof, etc., then the verdict should be for the plaintiff.

That there was evidence to support this instruction follows from what we have said above. It is assailed, however, upon the ground that the jury are not thereby required to find that the signal man actually gave a signal to the engineer to start the carriage when the buckets had not been raised to the proper height. There is no merit in this, however, for the reason that the instruction requires the jury to find that, because of Fisher's incompetency and unfitness, he caused the carriage upon this occasion to be started and moved along the track, when one of the buckets was hanging so low that it struck a certain crossbeam.

The instruction is further said to inhere with error because it assumes that the signal man was incompetent. But a reading of the instruction makes it perfectly clear that it is not open to such criticism; for it very plainly requires the jury to find that the signal man was unskilled, and not reasonably fit and competent to perform such duties, and that defendant negligently employed and retained him. The instruction nowhere assumes that the signal man was incompetent.

It is also said that there was no evidence upon which to base a finding that the defendant knew or by the exercise of ordinary care would have known of the incompetency of the signal man. This, however, is fully disposed of by what we have said above; and further comment is unnecessary.

III. Error is further assigned in the giving of plaintiff's instruction No. 2, which told the jury that if they found that defendant at said place then used and operated a certain carriage upon a track extending along the top of the sewer, "and that large buckets, by means of cables and steam power, were being lowered into the sewer and after being filled were hoisted up to the track and were being conveyed along

Digitized by Google

said track and over and above where plaintiff was standing and required to stand," and that the buckets, "*while so customarily operated, were hanging so low that they came in contact at their lower end with and against a certain wooden crossbeam or beams,* and that one of the said buckets was thereby tipped, tilted and caused to spill and drop a large rock which struck plaintiff on the back part of his head;" and that the defendant "adopted and used at said time and place, in conveying the said buckets along said track over plaintiff, as aforesaid, *a plan which was not reasonably safe in this, that said buckets were likely to tilt and swing and to strike the said crossbeam and to spill the said rock and injure plaintiff,*" and that defendant knew, or by the exercise of ordinary care should have known, that the said plan was not reasonably safe, etc., and that such negligence, if any, directly caused one of the buckets to strike a crossbeam and tilt, and to spill the rock and injure plaintiff, then plaintiff was entitled to recover. (The italics are ours.)

It is urged that the giving of this instruction was error because there was no testimony upon which to predicate it. Appellant's argument in this regard proceeds upon the theory that the portion of the instruction first above italicized requires the jury to find that the customary or normal way of handling the carriage and buckets, adopted by defendant, was to move the carriage when the buckets were so low that they came in contact with the crossbeams. And it is argued that plaintiff's own evidence is that the buckets were customarily operated (i. e., while Harbison was signal man and before Fisher began to perform such duties), at such a height that they would clear the crossbeams by a space of from four to six inches; and that there was no evidence that the customary or normal operation of the buckets was such as to cause them to strike the crossbeams, but that on the contrary all of the tes-

Digitized by Google

timony was to the effect that under Harbison this had never been known to happen.

We think, however, that the instruction is not to be given the meaning which appellant seeks to ascribe to it with respect to the use of the words "while so customarily operated." These words, as used in the first italicized portion of the instruction above, do not appear to have been intended to be construed with the language immediately following them, in the way that appellant construes them.

The instruction requires the jury to find that at the time and place when and where plaintiff was injured the defendant used and operated a certain carriage along a track, and that buckets were lowered into the sewer by means of cables, and which, when filled, were hoisted and conveyed along the track above plaintiff, etc., and that such buckets "while so customarily operated" were hanging so low that they came in contact with a certain crossbeam, or beams, and that one of said buckets was thereby tipped, etc. It does not seem that the jury would understand from this that they were required to find that defendant's custom, in the usual and normal operation of the machinery, was to operate the same with the buckets so low that they struck the crossbeams. The instruction does not require the jury to find that *defendant customarily operated* the buckets thus; nor that *as defendant customarily operated* them they were hanging so low that they came in contact with the beams. The wording of the instruction is somewhat unfortunate, but it appears first to deal with the general method employed in performing the digging operations by hoisting and conveying the buckets in the manner mentioned, and the jury are then required to find that the buckets "*while* so customarily operated," (i. e., according to defendant's general plan and method previously described) were, on this particular occasion, hanging so low as to come in contact with a beam or beams "and that one

Digitized by Google

of said buckets was thereby tipped," etc. In other words it appears that the jury were required to find that the buckets were on this occasion hanging so low that they came in contact with the beams; not that it was defendant's custom to normally operate them in this manner; and that the words "while so customarily operated" refer to the general method of handling the buckets, previously mentioned.

This appears to be further borne out by the succeeding portion of the instruction which we have above italicized, by which the jury were authorized to find that the general plan and method adopted by defendant was not reasonably safe, in that the buckets, as operated, were likley to tilt and swing and to strike the crossbeams. The latter appears to be the gist of the instruction, and which is predicated upon plaintiff's second assignment of negligence above mentioned, contained in his petition, and which charged that defendant's method or plan of operation was not reasonably safe.

And while the instruction is not drawn with great nicety or technical accuracy, nevertheless we think that the jury could not well have been misled by it into the belief that they were required to find that the defendant normally operated the buckets so low that they struck the crossbeams.

And we think that there was sufficient evidence upon which to predicate a finding that the general plan adopted by defendant, with which this instruction really deals, was not a reasonably safe one. There was testimony that, as the machine was then arranged and operated, the greatest possible clearance between the buckets and the crossbeams was about a foot or possibly fourteen inches; that even under the regular signal man the buckets were ordinarily stopped at a height of only from four to six inches above the crossbeams; that while the buckets were ascending rather

Digitized by Google

rapidly it was necessary for the signal man to cause them to be stopped and caught by the ratchet arrangement before they ascended high enough to forcibly strike or interfere with the machinery above, and when they were sufficiently high to clear the crossbeams; that the ratchet arrangement was such that if one of the so-called dogs missed a tooth on the ratchet wheel a bucket would drop back about eight inches. This testimony, together with the fact that the buckets were swinging suspended by cables attached to the bails thereof, and that the entire operation was a rapid one, tended to show that the method of operation was such that danger inhered therein with respect to the buckets striking the crossbeams and tilting; and there was evidence from which the jury might find that the defendant, upon the whole, had not adopted a plan of operation that was reasonably safe, at any rate when large rocks were being thus conveyed over the heads of unprotected workmen.

And what we have said above disposes of the contention that this instruction is inconsistent and in conflict with instruction No. 1 above discussed. Viewing instruction No. 2 as we do, the two theories of negligence are not inconsistent. Both were pleaded and were not without proof justifying their submission to the jury.

IV. A further assignment of error pertains to the giving of instruction No. 3 for plaintiff. This instruction, aside from the preliminary portion thereof, told the jury, in substance, that if the latter found that the conveying machine which defendant was using at the time and place in question was negligently constructed, arranged and used, in that the space between the bottoms of the buckets and the crossbeams was so small that there was immediate danger, in operating the buckets, of the lower ends thereof striking the crossbeams and spilling their contents; and that defendant

Digitized by Google

knew or by the exercise of ordinary care should have known thereof and that it was dangerous to plaintiff, while engaged in his work, for the buckets to be so operated and that the buckets were apt to swing, tilt and strike the crossbeams and injure plaintiff; and that such negligence of defendant, if any, directly caused one of the buckets to strike a crossbeam and tilt and to spill the rock and injure plaintiff, then their verdict should be for plaintiff.

It is said that there was no evidence upon which to predicate this instruction, for the reason that the testimony of witnesses for plaintiff and defendant alike was to the effect that the conveying machine used by defendant was a "Potter Sewer Machine," of standard type, and such as was generally in use in sewer work at the time in the city of St. Louis.

And in this connection appellant relies greatly upon Brands v. St. Louis Car Company, 213 Mo. 698, 112 S. W. 511, where, among other things, it is said: "No inference of negligence can arise from evidence which shows that the implement was such as is ordinarily used for like purposes by persons engaged in the same kind of business." . . .

That was a case involving the liability of a master for injuries sustained by the servant caused by the bursting of an emery wheel. And the negligence upon which the case was grounded was that defendant did not use a certain convex wheel instead of the straight one which burst. [See, also, Chrismer v. Telephone Co., 194 Mo. l. c. 208, 209, 92 S. W. 378; Coin v. Lounge Co., 222 Mo. l. c. 506, 121 S. W. 1; Jewell v. Bolt & Nut Co., 231 Mo. 176, 132 S. W. 703; O'Dowd v. R. R. Co., 166 Mo. App. l. c. 669, 150 S. W. 729.]

But obviously this doctrine is wholly without influence here. This is for the reason that the testimony upon which appellant relies in this regard goes not further than to show that the sewer machine was one of standard type, generally in use. This instruction,

Digitized by Google

which is predicated upon the third assignment of negligence, mentioned above, and pleaded in the petition, proceeds not upon the theory that defendant was negligent in using a sewer machine of this type or sort, but upon the theory that the machinery, comprising the same was negligently arranged and placed, in that, as the parts were then correlated and operated, the space between the bottoms of the buckets and the cross-beams was too small for the safe operation thereof. The theory of negligence thus submitted does not differ materially from that submitted by instruction No. 2, but deals more particularly with the arrangement of the parts of the device, as it was then being operated.

There was evidence tending to show that the mechanism employed could be so arranged that the buckets could be raised to a greater height than that permitted by defendant's arrangement thereof. And in this regard it was not shown that it was usual or customary to operate such mechanism as defendant did operate it, under like circumstances and conditions.

Without repeating what we said above respecting the giving of instruction No. 2, we think it clear that there was sufficient evidence to justify the giving of the instruction now under consideration. There was sufficient evidence from which the jury might find that defendant had breached its duty to the servant, under the theory of negligence submitted by this instruction, and that such operated to cause plaintiff's injury.

V. Further assignments of error are disposed of by what has been said above, and need not be separately noticed. A careful examination of the record has convinced us that no error prejudicial to the appellant intervened below. No point is made respecting the amount of plaintiff's recovery. The judgment should therefore be affirmed. It is so ordered. Nortoni, *J.*, concurs. *Reynolds, P. J.*, dissents, being of the opinion that the demurrer to the evidence should have been sustained.

Digitized by Google

WILLIAM H. PENDEGRASS, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **TRIAL PRACTICE: Conflicting Evidence: Question for Jury.** Where there is evidence on both sides of a disputed issue of fact, the question is for the jury.

2. **MASTER AND SERVANT: Injury to Servant: Breaking of Ladder: Question for Jury.** In an action for injuries sustained by a servant by the breaking of a ladder which he was descending in the performance of his work, *held*, under the evidence, that the question of whether it was a part of his duties to see that the ladder was kept in a reasonably safe condition, as being part of the appliances placed in his charge, was for the jury.

3. ———: ———: ———: **Assumption of Risk.** Where a ladder was a part of the premises upon and about which a servant was required to work and was the only method provided for ingress to and egress from a pit into which it was necessary for the servant to go, and the servant, prior to the time he was injured by reason of the ladder breaking while he was descending it, had been employed at the place only six days, *held*, under the evidence, that it cannot be said that he knew the condition of the premises or that he assumed the risk of any danger that might lurk therein which was not so obvious as to deter a man of ordinary prudence from using the same; it being the master's duty to exercise ordinary care to furnish him with a reasonably safe place in which to work, including reasonably safe means of access to the pit.

4. ———: ———: ———: ———: **Simple Appliance.** A ladder, which was the only method provided for ingress to and egress from a pit into which it was necesary for a servant to go, was not a "common tool" but a fixed portion of the premises upon which and about which the servant was required to work, and hence the "simple appliance doctrine" was not applicable in an action by the servant for injuries sustained by reason of the ladder breaking while he was descending it.

5. ———: **Appliances and Place of Work: Duty of Master to Inspect.** The master does not discharge his duty by furnishing his servant with a proper place in which and proper appliances with which to work, but it is his duty to inspect and make such

Digitized by Google

examinations and tests, at reasonable intervals, as are reasonably necessary to ascertain the condition of the place and appliances.

6. ———: **Injury to Servant: Defective Ladder: Question for Jury.** In an action for injuries sustained by a servant by the breaking of a ladder which he was descending in the performance of his work, *held*, under the evidence, that the jury might reasonably infer that the rung which broke had become insecurely fastened owing to its continued use through a long period of time, and that reasonably careful and frequent inspection thereof would have revealed the defect; *held, further*, that the evidence warranted an inference that the ladder as constructed was not a reasonably safe appliance for the use to which it was put; and hence it is *held* that whether the master was liable, was a question for the jury.

7. ———: ———: ———: **Instructions.** In an action for injuries sustained by a servant by the breaking of a ladder which he was descending in the performance of his work, the court instructed, at the instance of plaintiff, that it was defendant's duty to furnish appliances that were reasonably safe, and that if defendant neglected such duty and there was a defective rung on the ladder and defendant knew thereof, or by ordinary care could have known of it, and by reason thereof the rung broke and caused plaintiff to fall while he was exercising ordinary care, he was entitled to recover. *Held*, that although the first part of the instruction charged that it was defendant's duty to furnish appliances that were reasonably safe and secure, the instruction is not to be condemned as imposing the liability of an insurer on defendant, in view of the fact that a subsequent part of the instruction required the jury to find that defendant either knew of the unsafe or insufficient condition of the appliance, or by the exercise of ordinary care could have known of the same. *Held, further*, that if the instruction, standing alone, could be said to be erroneous, it was cured by instructions given at defendant's request, requiring the jury to find that the ladder was in an unsafe and dangerous condition, and that defendant knew or by ordinary care could have known thereof, to warrant a recovery by plaintiff, and charging that if the defect in the rung was hidden and could not have been known to defendant by ordinary care, plaintiff could not recover, and that defendant was not an insurer against danger in the use of the ladder nor required to furnish plaintiff with the safest or most modern ladder to be used by him, but was only required to furnish plaintiff a ladder that was reasonably safe for the purposes intended.

8. ———: **Furnishing Appliances: Duty of Master.** The master is not an insurer of the absolute safety of appliances fur-

Digitized by Google

nished the servant or of the place furnished him to work, the master's duty being simply to exercise ordinary care to that end.

9. **INSTRUCTIONS: Construction: Entire Charge Considered.** In determining whether an instruction is erroneous, it must be construed in connection with the other instructions given, and an ambiguous or general term in one instruction may be explained by another instruction, and a partial view may also be thus supplemented, provided the whole be consistent and harmonious.

10. **DAMAGES: Personal Injuries: Instructions.** In an action for personal injuries, an instruction that if the jury found for plaintiff, they should assess his damages at such an amount as would be a fair compensation for the injuries, if any, received by him, and that in estimating the amount, the jury might consider the character of plaintiff's injuries, whether they were permanent, the bodily pain suffered, if any, by reason of the injuries received, and any bodily pain plaintiff would likely suffer in the future, the reasonable value of time lost, if any, etc., was not vulnerable to the objection that it failed to limit the future bodily pain for which plaintiff was permitted to recover to such as would be the direct result of the injuries sustained.

11. ———: ———: ———. In an action for personal injuries, an instruction that if the jury found for plaintiff, they should assess damages in his favor for "any bodily pain and anguish he will likely suffer in the future, if any," was not erroneous because of the use of the word "likely."

12. ———: ———: **Impairment of Earning Capacity in Future: Pleading.** In an action for personal injuries, the petition alleged that plaintiff's limbs were partially paralyzed and that by reason thereof plaintiff had suffered and would continue to suffer great mental anguish and bodily pain, had been unable to do any business or follow his usual avocation whereby he formerly earned a living for himself and family, and had been all the time since his injury and still was unable to do or perform any manual labor, and was totally and permanently disabled. On objection by defendant that the petition did not plead loss of earnings in the future as an element of damage and that it was therefore improper to permit an award of damages therefor, *held* that it has never been the practice, in actions for personal injuries, to aver special damages will accrue in the future from impairment of earning capacity (following Scholl v. Grayson, 147 Mo. App. l. c. 664); *held, further*, that, in any event, the allegation that plaintiff had been unable to follow his usual avocation, coupled with the allegation that the cause which produced that result

Digitized by Google

was permanent, was sufficient to permit a recovery for this element of damage (following Ingles v. Railroad, 145 Mo. App. l. c. 247).

13. ———: ———: **Excessiveness of Verdict.** Plaintiff fell to the bottom of the pit of a pump house, causing a permanent injury to the lower part of his spine. He was confined to his bed forty-four days, and after this went about on crutches for a time. Physicians testified that he had a chronic disease of the nerve substance of the spinal cord, that it was progressive and permanent, and that he would not be able to do any manual labor. He had previously earned from $45 to $55 per month. *Held*, that a verdict awarding him $6000 was not excessive.

Appeal from Cape Girardeau Circuit Court.—*Hon. C. B. Faris*, Judge.

AFFIRMED.

W. F. Evans, Moses Whybark and *A. P. Stewart* for appellant.

(1) The demurrer to the evidence should have been sustained, because: (a) Plaintiff had full charge of the pump house and all appliances, including the ladder, and it was his duty to see that it was kept in a reasonably safe condition. He was a vice principal. Forbes v. Dunnavant, 198 Mo. 208; Knorpp v. Wagner, 195 Mo. 662; Herbert v. Ferry Co., 107 Mo. App. 297; Steffenson v. The Roehr Co., 136 Mo. App. 228; Bowen v. Railroad, 95 Mo. 277; Miller v. Railroad, 109 Mo. 356; Tel. Co. v. Jeffries, 154 S. W. 1114; Williams v. Ransom, 234 Mo. 71; Henson v. Stave Co., 151 Mo. App. 243; Modlagl v. Foundry Co., 248 Mo. 587, 154 S. W. 752. (b) Plaintiff had used the ladder thirty or thirty-five times without accident. It was a simple appliance; he knew its condition, better even than his master, and he must be held to have assumed the risk. Steinhauser v. Spraul, 127 Mo. 541; Blundell v. Mfg. Co., 189 Mo. 560; Marsh v. Chickering, 101 N. Y. 396; Cahill v. Hilton, 106 N. Y. 518; Sheridan v. Gorham

Digitized by Google

Mfg. Co., 13 L. R. A. (N. S.) 687. (c) Even if there was a defect in the ladder, such defect was a latent one, which could not have been discovered by the exercise of ordinary care on the part of the master, and there can be no recovery. Lee v. Railroad, 112 Mo. App. 396. But the ladder was a "common tool," to which the rule of ordinary care on the part of the master does not apply. Vanderpool v. Partridge, 13 L. R. A. (N. S.) 668; Dickenson v. Jenkins, 144 Mo. App. 136. The duty of inspection by the master of appliances used by servants does not extend to small and common tools in every day use. Wachsmuth v. Electric Co., 118 Mich. 275. (d) The ladder was peculiarly within the knowledge of plaintiff, and exclusively under his control. He therefore cannot be aided by the rule of *res ipsa loquitur*. Klebe v. Distilling Co., 207 Mo. 486; Railway v. Andrews, 96 S. W. 183. (2) The first instruction given for plaintiff is erroneous, since it placed upon defendant the absolute duty to furnish plaintiff a reasonably safe appliance; whereas the law only requires that the defendant use ordinary care to furnish a reasonably safe appliance. The master is not an insurer of the absolute safety of either the servant or the appliance. Henson v. Stave Co., 151 Mo. App. 244; Bowen v. Railroad, 95 Mo. 268; Blanton v. Dold, 109 Mo. 64; Glover v. Bolt & Nut Co., 153 Mo. 327; Minnier v. Railroad, 167 Mo. 99; Chrismer v. Tel. Co., 194 Mo. 189; Beebe v. Transit Co., 206 Mo. 419; Brown v. Land & Lbr. Co., 65 Mo. App. 162; Marshall v. Hay Press Co., 69 Mo. App. 256; Stalzer v. Packing Co., 84 Mo. App. 570; Bennett v. Lbr. Co., 116 Mo. App. 699; Chenoweth v. Sutherland, 129 Mo. App. 438. (3) The second instruction given for plaintiff is erroneous for two reasons: (a) It permitted the jury to take into consideration "any bodily pain and anguish that plaintiff will likely suffer in the future, if any;" without limiting it to such as would be the direct result of the injuries sustained. (b) It

Digitized by Google

permitted the jury to take into consideration "the reasonable value of the time lost, if any, since the injury and on account thereof; the extent, if any, to which plaintiff will be prevented and disabled by reason of said injury from earning money in the future." The petition does not allege loss of time or earnings. Loss of earnings must be specially pleaded. Ingles v. Railroad, 145 Mo. App. 247; Edwards v. Railroad, 79 Mo. App. 259; Slaughter v. Railroad, 116 Mo. 269; Scholl v. Grayson, 147 Mo. App. 664; Coontz v. Railroad, 115 Mo. 674; Scholl v. Grayson, 147 Mo. App. 664. Instructions must not be broader than the pleadings. Fulkerson v. Thornton, 68 Mo. 468; Melvin v. Railroad, 89 Mo. 106; Whitlock v. Appleby, 49 Mo. App. 297; Black v. Railroad, 217 Mo. 685; Kellogg v. Kirksville, 132 Mo. App. 519; State ex rel. v. Land & Lbr. Co., 161 Mo. 673. (4) The fifth instruction given on behalf of plaintiff is erroneous. Authorities cited under point I. (5) The verdict of the jury is excessive.

Lane & Alexander for respondent.

(1) The demurrer to the evidence offered by plaintiff was properly overruled; there is ample evidence in the record to justify the submission of this case to the jury. 4 Thompson on Negligence, sec. 3960; Thomas on Negligence, Rules, Decisions and Opinions, pp. 790, 792, 793; Thompson on Negligence, White Supplement, secs. 3949, 3950, 3952; Bailey on Personal Injuries (2 Ed.), p. 2160; 1 Bailey on Personal Injuries, p. 356; White on Personal Injuries on Railroads, sec. 152; Twombly v. Consolidated Electric Light Co., 64 L. R. A. 51; Porter v. Railroad, 60 Mo. 160; Porter v. Railroad, 71 Mo. 66; Railroad v. Harris, 107 S. W. 108; Czernicke v. Ehrlich, 212 Mo. 395; Phippin v. Railroad, 196 Mo. 339; Bible v. Railroad, 154 S. W. 883; East Tennessee Co. v. Jeffries, 154 S. W. 1112; Steinhauser v. Spraul, 114 Mo. 551; Han-

Digitized by Google

lan v. Railroad, 104 Mo. 381; Murray v. Railroad, 101 Mo. 236; Railroad v. Cox, 55 S. W. 354; Bowen v. Railroad, 95 Mo. 278; Miller v. Railroad, 109 Mo. 356, 357; Adams v. Railroad, 102 S. W. 906, 907; Green v. Banta, 48 N. Y., Super. Ct. R. 156; Green v. Banta, 97 N. Y. 627; Solarz v. Railroad, 29 N. Y. Supp. 1123. (2) According to undisputed evidence, respondent was directed to go to Crystal City to take charge of the pump at that place, and his duty was to run the pump and pump water, as shown by all the evidence. The ladder was an appliance furnished by the master, and under the law it was the master's duty to furnish reasonably safe appliances, which were fit for the purpose for which they were intended to be used. Respondent did not select the ladder or choose the material of which it was constructed. Therefore, none of the decisions cited under point I in appellant's brief are applicable to this case. It was the duty of appellant by inspection, to keep his appliances and machinery reasonably safe, and in that regard to exercise reasonable care commensurate with the nature of the business, to protect its servants from the hazards incident to it. This duty the law imposes on the master and will not allow him to cast it off. It is contrary to public policy to allow the master to relieve himself by contract from liability from his own negligence. The servant never assumes the risk of the master's negligence. Phippin v. Railroad, 196 Mo. 347; Bible v. Railroad, 154 S. W. 883; Lee v. Railroad, 112 Mo. App. 391; Porter v. Railroad, 71 Mo. 77; Czernicke v. Ehrlich, 212 Mo. 395; Railroad v. Beasley, 155 S. W. 187. (3) Appellant specially complains of plaintiff's instructions Nos. 1, 2 and 5. There were five instructions given for the plaintiff, and eleven instructions for the defendant. We submit that, as a whole, the instructions fairly cover the law and the evidence, and that there are no vital defects in the plaintiff's instructions; on the other hand, appellant's instructions cover

Digitized by Google

every phase of the case and every defense urged by it. Porter v. Railroad, 71 Mo. 66; Porter v. Railroad, 60 Mo. 160; Bible v. Railroad, 154 S. W. 883; Lee v. Railroad, 112 Mo. App. 391; Czernicke v. Ehrlich, 212 Mo. 394; Phippin v. Railroad, 196 Mo. 347; Texas Co. v. Strange, 132 S. W. 372. (4) (a) Plaintiff's instruction No. 2 is on the question of the measure of damages, and which we think, under all the decisions in this State, is well enough. We content ourselves with citing a few cases which we think are directly on the point and that discuss this precise question. Bible v. Railroad, 169 Mo. App. 519, 154 S. W. 883; Reynolds v. Transit Co., 189 Mo. 419, par. 4, and cases cited; Scholl v. Grayson, 147 Mo. App. 664, 665; Smith v. Railroad, 155 S. W. 56; Beasley v. Railroad, 155 S. W. 187; Dean v. Railroad, 199 Mo. 393; Devoy v. Transit Co., 192 Mo. 206; Haywood v. Kiehn, 151 S. W. 207. (b) The instruction is criticised because it is alleged that it permitted the jury to take into consideration the reasonable value of the time lost, if any, since the injury, and on account thereof; the extent, if any, to which plaintiff would be prevented and disabled by reason of said injury from earning money in the future. This precise point is thoroughly discussed and is ruled against the contention of the appellant in the case of Scholl v. Grayson, 147 Mo. App. 664. (c) Appellant is estopped now from complaining about the measure of damages submitted, for the reason that the evidence shows a permanent disability, and for the further and more potent reason that the court is not required in civil cases to instruct on every and all questions whether suggested or not; and for the further reason that there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment of damages. If the instructions on the measure of damages was broader than was warranted in the opinion of appellant, it was its duty to offer a correct instruction on that point

Digitized by Google

and thereby call the court's attention to the question. Geismann v. Electric Co., 173 Mo. 679, and cases cited; Hughs on Instructions, sec. 57; Railroad v. Worthy, 27 S. W. 426.

ALLEN, J.—This is an action by a servant against the master for personal injuries alleged to have been sustained while in the latter's employ. There was a verdict and judgment for plaintiff below, and the case is here upon defendant's appeal.

At the time that plaintiff received his injuries he was working for the defendant railroad company, as a "pumper," at the latter's pumping station at Crystal City, his principal duty being to operate a pump for the purpose of keeping a supply of water in defendant's water tank at said place. It appears that plaintiff, who had previously worked for the defendant, was employed on or about November 1, 1910, to go to Crystal City as a pumper and relieve the man then engaged in doing such work at that place. The evidence discloses, however, that he did not begin work until November 5, 1910. At this pumping station of defendant, the pump and boiler used for pumping water into the tank were situated in what is called a "pit." The latter, it seems, was about ten or twelve feet deep. The floor, or at least a part thereof, was of concrete, upon which stood the boiler and pump. The only means provided for ingress and egress to and from the pit consisted of a wooden "ladder," which was firmly fixed in place as a sort of stairway, to be used whenever it became necessary to descend into the pit. It appears that the sides of this ladder were pieces of pine about four inches wide by two inches thick, and that the steps, or rungs, of the ladder consisted of simple pine slats, about three inches, or possibly less, in width, and an inch or less in thickness, which were nailed to the side pieces. It appears that plaintiff's duty as a pumper were ordinarily per-

Digitized by Google

formed above ground, and not in the pit, but that it was necessary for him at times, sometimes several times a day, to descend into the pit to look after matters pertaining to the machinery located therein.

Upon the sixth day after plaintiff had been sent to this place, viz., on November 11, 1910, while descending the ladder that led into the pit, one of the slats thereof gave way, causing him to fall to the bottom of the pit, upon the pump, whereby he sustained the injuries for which he sues.

It appears that the slat which gave way was the third one from the top. The testimony respecting the appearance of the ladder and slat after the accident (neither of which was in evidence) tended to show that the slat had been supported, at the end thereof which gave way, by two nails; and that it had been pulled or forced from about the lower nail, and had split out from the upper nail, the split extending diagonally along the slat, perhaps half way of its length, and coming out at the upper edge thereof.

The evidence was to the effect that this crack or split was a fresh one. It seems that this ladder had been in the pit for at least four or five years; how much, if any, longer does not appear; and there was testimony to the effect that it was so covered with dirt and grease that one could not discover much concerning its character or condition by merely looking at it in that condition. It appears that it was rather dark in the pit, and that there was frequently water in the bottom thereof.

On behalf of defendant one witness, Mr. Brooke, defendant's general foreman of the bridge and building department, which included the water service, testified that one could stand on one slat or rung of the ladder and take his foot and kick off another slat; and he gave it as his opinion that the plaintiff kicked off the slat in question and fell purposely, in order to bring a lawsuit against the company.

Digitized by Google

A Mr. Prior was foreman of the water service department, under the bridge and building department. It was he who employed the plaintiff. He testified that any light repairs which a pumper could make himself, the latter was expected to look after; and that anything in the nature of "heavy repairs" the pumper was supposed to report to the witness, who in turn would report it to his superior, Mr. Brooke; and that in case a new ladder were necessary, it would have to be so reported to him and by him to his superior. He testified that, upon employing plaintiff on this occasion, he told him "to put everything in good shape" at the pumping station; but he stated that what he meant by this was that the man who had previously had charge at this place "had been a little careless, oil spilled over the floor, the boiler was dirty and I wanted him to—had reference to the condition of the pump and engine."

On behalf of defendant there was testimony to the effect that it was the duty of the pumper at any station to make repairs of the nature here in question. However, it appears that plaintiff heretofore, in performing the duties of pumper, had not been located at a station where such a ladder was used. Defendant's foreman who employed him testified that he said nothing to plaintiff about the ladder. And plaintiff on his part testified that he had been previously told by the foreman, his immediate superior, that the latter had nothing to do with the woodworking department, "that the pump and boiler was what he was supposed to look after;" and that the woodworkmen were supposed to do the woodwork on all the buildings and structures; and that plaintiff had not been instructed to make inspection or repairs of such things, and that he had never done so previously while working for defendant. He stated that the foreman on this occasion told him to go and take charge of this station, for the time being, saying: "We are going to cut that place out, you go

Digitized by Google

up and stay until we get the glass people in fix so they can furnish us water; I will move you to a better place."

It appears that no inspection was made of the ladder during the time that plaintiff worked there; and the only evidence of any inspection at all is to be found in the testimony of Mr. Brooke, the general foreman of the bridge and building department, who testified that about the latter part of September or early October of that year, he was in the pit with a torch; that he was always examining for defects, etc., and that he looked at the ladder and saw nothing wrong with it.

Defendant's pump repairer, whose duties pertained to repairing the pumps and pumping stations, testified that he had never been given any instructions to make repairs on this ladder or to examine it to see whether it needed repairs.

I. Appellant earnestly contends that the trial court erred in overruling the demurrer to the evidence interposed by it, and insists that plaintiff failed to make out a case entitling him to go to the jury. Appellant's contention in this regard is based, for one thing, upon the theory that plaintiff had full charge of the pump house and all appliances therewith connected, including the ladder, and that it was his duty to see that it was kept in a reasonably safe condition. As to this, however, it is sufficient to say that the evidence was not uncontroverted on this score. It is true that there was testimony on behalf of defendant tending to show that defendant expected a pumper, as a part of his duties, to look after the making of repairs of this character, in order to see that such things were kept in a reasonably safe condition. But, on the other hand, it appears that plaintiff had never before worked at a station which required the use of a ladder as this did; and it was not shown that he was informed that he was required to look after such things. His testi-

Digitized by Google

mony tends to show that such was not included within his duties; and certain it is that there was no testimony that he was specifically instructed with respect thereto. Defendant's foreman, under whose immediate supervision plaintiff came, said that he told plaintiff to "put everything in good shape;" but he explained that this had reference to the condition of the pump and engine.

It being a controverted question of fact whether or not plaintiff, as defendant's employee, was charged with the duty, not only of attending to the pump, but of keeping the premises and appurtenances thereabout in repair and in reasonably safe condition, the trial court quite properly referred this question to the jury by an instruction. As defendant's theory in this regard was not conclusively established by the testimony, for that reason alone the court could not have properly sustained its demurrer to the evidence upon that ground.

Further contention is, that defendant had used the ladder quite a number of times during the period in question; that it was a simple appliance, and that he knew its condition even better than the master and must be held to have assumed the risk therefrom. This contention is without merit, however, for the reason that the ladder was a part of the premises upon and about which plaintiff was required to work. It was the only method provided for ingress and egress to and from the pit into which it was necessary for him to go from time to time. He had been employed at this place but six days, and it cannot be said that he knew the condition of the premises, or that he assumed the risks of any dangers that might lurk therein, which were not so obvious as to deter a man of ordinary prudence from using the same. It was the master's duty to exercise ordinary care to furnish him a reasonably safe place to work, which included a reasonably safe means of access to the machinery in the pit.

Digitized by Google

And the ladder was not a "common tool," or in fact in this case a tool at all, in the proper sense of that term, but a fixed portion of the premises upon and about which the plaintiff was required to work. And whatever may be said as to the rule regarding the duty of the master to inspect appliances in the nature of common tools of every day use, such rule would clearly have no application here.

But it is said that the defect in the ladder, if any, was a latent one which could not have been discovered by the exercise of ordinary care on the part of the master, and that therefore there can be no recovery. But we think that there was sufficient evidence to take to the jury the question of whether the master had properly discharged its duty toward the servant to exercise reasonable care to provide the latter with a reasonably safe place to work. It appears that this ladder had been in use for a number of years. Defendant's foreman of the bridge and building department testified that it was there when he took charge of these departments nearly four years before the accident. The pump repairer thought that it had been there as long as he had had anything to do with this station, which was four or five years. No witness could say when it had been installed. There was no evidence of any repairs ever having been made upon it, nor was there any evidence that it had ever been inspected in a way which would have revealed any defects or insufficiencies therein.

It is true that defendant's foreman of the bridge and building department testified that, a month or more before the accident, he was in the pit and examined the ladder and the premises generally, as was his custom; but it quite clearly appears that this examination was a very superficial one. There was testimony to the effect that the ladder was so covered with dirt and grease that one looking at it by the light of a torch, as did this witness, could see but little, if any-

Digitized by Google

thing, more than the fact that it remained intact. This witness merely said that while he was in the pit he "looked at the ladder;" and said: "I am always looking for defects; I examined the ladder when I was there and went up and down it; I had a torch."

This was the only evidence relating to any inspection of the ladder at any time prior to the accident. The duty resting upon the master in such cases to inspect and make such examinations and tests, at reasonable intervals, as may be reasonably necessary to ascertain the condition of the place or instrumentality in question is an affirmative and continuing duty. "It will not do to say that having furnished suitable and proper machinery and appliances, the master can thereafter remain passive, so long as they work well and seem safe. The duty of inspection is affirmative and must be continually fulfilled and positively performed. Anything short of this would not be ordinary care." [Ogan v. Railroad, 142 Mo. App. l. c. 252, 126 S. W. 191, quoting approvingly from Houston v. Brush, 66 Vt. 331, 29 Atl. 380.]

And relative to the performance of the master's duty to inspect, our Supreme Court in Gutridge v. Railway, 105 Mo. 520, 16 S. W. 943, said: "We quote these authorities to show that the master is not always, and under all circumstances, excused if he could not *see* a defect. And if the conditions are such as would excite suspicion in a man of ordinary prudence, he must go further and apply other tests. . . . What the ordinary tests, as applied to railroad appliances, are, is not disclosed by this record; but we feel satisfied that *looking* is not the only test. The master must use such reasonable tests to discover defects as ordinary prudence suggests."

And in Labatt on Master & Servant it is said: "In view of the natural tendency of an inorganic instrumentality to become less and less safe the longer it is used, a court will not set aside a verdict for the servant

Digitized by Google

which is based upon the theory that the failure to inspect it was culpable, where the evidence shows that it had been a part of the master's plan for such a period that, taking into account the nature of the materials of which it was composed, the functions it was performing, and the various influences to which it was exposed by climatic changes or physical forces, it is not an unreasonable inference that a prudent man would have examined it for the purpose of ascertaining what its actual condition was." [3 Labatt on Master & Servant (2 Ed.), sec. 1061, p. 2808.]

Further authorities might be cited, but the foregoing are sufficient to indicate the rule applicable to such a situation, with respect to the master's duty to inspect. In the instant case it was not shown that the slat in question contained a concealed defect, such as an old crack, or a worm-eaten or decayed place; but there is evidence tending to show that the lower of the two nails which supported it at one end pulled through the slat, causing the latter to split off at the other nail from the strain thus placed upon it; the split extending diagonally along the slat and ending at the upper edge thereof. The jury might reasonably infer from this that the slat, for one thing, had become insecurely fastened in place, owing to its continued use through a long period of time and the deterioration naturally incident thereto, and perhaps increased by the dampness to which it was exposed in the pit; and that reasonably careful and frequent inspections thereof would have revealed the same.

There is some evidence from which the inference may also be drawn that the ladder, as a fixed and permanent means of access to the pit, was, as originally furnished, not reasonably safe for such permanent and continued use. It seems that it was a mere pine ladder, the slats thereof not being notched into the side pieces, but merely laid upon the latter and fastened by nails. And one of defendant's witnesses volunteered

Digitized by Google

the statement that one could stand on one slat or rung thereof and with his foot kick off another one. This would indicate that the ladder was not a very stable structure for use as a permanent stairway, so to speak, furnishing a means of access to the bottom of the pit. However, we are primarily concerned with its condition at the time that it was furnished to this plaintiff. It was defendant's duty to furnish plaintiff at said time a reasonably safe means of access to the machinery situated at the bottom of the pit. And if the ladder furnished was not reasonably safe for such purpose, and the defendant could have discovered it by exercising ordinary care to that end, then defendant became liable to its servant for injuries sustained by reason thereof, if such servant was in the exercise of ordinary care in using the same. [See Cabannee v. St. Louis Car Co., 178 Mo. App. 718, and authorities cited.]

We think that the evidence adduced, together with the inferences which may be fairly drawn therefrom, were sufficient to make it a question for the jury, whether the defendant had breached its duty to exercise ordinary care to furnish plaintiff with a reasonably safe place to work; and that the court could not properly have declared, as a matter of law, that the defendant had fully discharged its whole duty in this respect.

The theory that plaintiff purposely kicked off one of these slats and fell, in order to bring suit against the defendant, is not pressed here. The opinion of one of defendant's witnesses below with respect to this question was, of course, without probative force. But we need not discuss the matter, for if there can be said to have been any evidence tending to show that plaintiff fell purposely, the question was here one entirely for the consideration of the jury.

Digitized by Google

We think that the learned trial judge committed no error in overruling defendant's demurrer to the evidence and sending the case to the jury.

II. At the request of plaintiff the court gave five instructions; and eleven were given at defendant's request. Error is assigned with respect to the giving of the instructions for plaintiff.

Plaintiff's first instruction, in substance, told the jury that it was defendant's duty to furnish appliances, "such as a ladder for means of ingress and egress to and from said pump, *that were reasonably safe,* secure and sufficient for the transaction of its business," and that if the jury should find that defendant neglected its duty in this behalf, etc., and that there was a defective or insufficient crosspiece or rung upon the ladder, *and that defendant knew thereof "or by the exercise of ordinary care and prudence could have known of the same,"* and that by reason thereof such crosspiece or rung of the ladder broke and gave way and thereby caused plaintiff to fall, and that plaintiff exercised ordinary care for his own safety, then the verdict should be for plaintiff.

This instruction is assailed upon the ground that it places upon defendant the absolute duty to furnish plaintiff a reasonably safe appliance or place to work; whereas, the law requires only that defendant use *ordinary care* to furnish a reasonably safe appliance or place to work.

It is, of course, quite true, as appellant asserts, that the master is not an insurer of the absolute safety of the appliance furnished the servant, or of the place furnished him to work. The master's duty is unquestionably to exercise ordinary care to such end. However, we think that the instruction under consideration is not open to the attack made upon it. It is true that the earlier part of the instruction tells the jury that it was defendant's duty to furnish appliances, etc., that

Digitized by Google

were reasonably safe and sufficient. Further on in the instruction, however, the jury are required to find that the defendant either knew of such unsafe or insufficient condition thereof, or by the exercise of ordinary care and prudence could have known of the same. [See Girard v. Coke & Coal Co., 207 Mo. 242, 105 S. W. 767.]

Furthermore, if there could be said to be any error in this instruction in this regard, it was fully cured by the instructions given at defendant's request. One of these required the jury to find that the ladder "was in an unsafe, defective and dangerous condition" and that "defendant knew, or by the exercise of ordinary care could have known," thereof. And another told the jury that if the "defect in the rung was hidden and could not have been known to defendant by the exercise of reasonable care" plaintiff could not recover. And still another told the jury that "defendant was not an insurer of the plaintiff against the danger in the use of the ladder, nor was the defendant required to furnish plaintiff with the safest, best and most modern ladder to be used by him in the performance of his duties, as the employee of the defendant; but the defendant was only required to furnish plaintiff with a ladder which was reasonably safe for the purposes it was intended."

It will be observed that defendant, by the instruction last mentioned, likewise had the jury told that defendant's duty was "to furnish plaintiff with a ladder that was reasonably safe," and not that it was defendant's duty to exercise reasonable care to that end. And furthermore, it is very apparent that, considering the instructions as a whole, the jury could not possibly have been misled as to the defendant's duty in the premises.

All of the instructions must be read together before condemning one for such an error as is said to inhere in plaintiff's first instruction. [See Jackson v.

Digitized by Google

Tel. Co., 156 S. W. 801, and cases cited.] "An ambiguous or general term in one instruction may be explained by another instruction, and a partial view may also be thus supplemented, provided the whole be consistent and harmonious." [Gibler v. Terminal R. R. Ass'n, 203 Mo. l. c. 222, 101 S. W. 371.]

III. Plaintiff's second instruction told the jury that if they found the issues for plaintiff, to "assess his damages at such an amount as would, in their judgment, be a reasonable and fair compensation to plaintiff for the injuries, if any, received by him on the occasion in question;" and that in estimating the amount thereof the jury might "take into consideration the extent and character of said injuries so received, if any, and whether the same are permanent; the bodily pain and anguish suffered by plaintiff, if any, by reason of the injuries received, if any, and any bodily pain and anguish that plaintiff will likely suffer in the future, if any; the reasonable value of the time lost, if any, since the injury and on account thereof; the extent, if any, to which plaintiff will be prevented and disabled by reason of said injury from earning money in the future;" the verdict not to exceed twenty-five thousand dollars.

This instruction is said to inhere with error because "it permitted the jury to take into consideration 'any bodily pain and anguish that plaintiff will likely suffer in the future, if any;' without limiting it to such as would be the direct result of the injuries sustained." But there is no merit in this contention. This clause of the instruction is immediately subjoined to and connected with the preceding clause referring to past pain suffering; and it is quite apparent that the words "by reason of the injuries received" were intended to be taken with both such clauses, which are included between semicolons and separated by a comma only, and which taken together constitute that portion of the in-

Digitized by Google

struction which relates to pain and suffering as an element of damages. And the use of the word "likely," under such circumstances, did not constitute reversible error. [See Garard v. Coal & Coke Co., 207 Mo. 242, 105 S. W. 767; Holden v. Railroad, 108 Mo. App. 665, 84 S. W. 133.]

IV. This instruction is further assailed upon the ground that the petition does not allege loss of time or earnings; whereas the instruction permitted the jury to take into consideration "the reasonable value of the time lost, if any, since the injury and on account thereof; the extent, if any, to which plaintiff will be prevented and disabled by reason of said injury from earning money in the future."

Respecting this question the petition, after setting forth plaintiff's injuries and averring that they caused a partial paralysis of the lower limbs, etc., alleges: "That by reason of said great hurt, wound and injuries so received, plaintiff has suffered, does now, and will continue to suffer great mental anguish and bodily pain; that by reason of said injuries, plaintiff has been unable to do any business, or follow his usual avocation whereby he formerly earned a living for himself and family and has been all the time since said injury, and is now, unable to do or perform any manual labor whatsoever, and that he is totally and permanently disabled by reason of the injuries aforesaid." From this it plainly appears that the petition at least counts upon past loss of earnings. The allegation that plaintiff had been unable to do any business or follow his usual vocation, whereby he formerly earned a living, and that since the injury he had been unable to perform any manual labor, is tantamount to an averment of loss of earnings. It is specifically averred that plaintiff, since the receiving of his injuries, had been unable to perform any labor whereby he previously earned a living, which necessarily means that he had lost the earnings

Digitized by Google

of his labor, upon which he was dependent for a livelihood.

Appellant's contention with respect to the failure to allege loss of earnings, can find support, if at all, only in so far as it relates to future loss of earnings, upon the ground that such loss is not specifically pleaded. It is true, as appellant says, that it has been held that an allegation of permanent injuries, such as we have here, is not equivalent to alleging loss of time or earnings. [See Coontz v. Railroad, 115 Mo. 669, 22 S. W. 572; Gerdes v. Christopher & Simpson, etc., Co., 124 Mo. 347, 27 S. W. 572, 615.] But in Scholl v. Grayson, 147 Mo. App. l. c. 664, 665, 127 S. W. 415, it was pointed out that "the decisions requiring a special averment in order to recover loss of earnings, had been given in cases where the loss sought to be recovered was of past earnings, and it never had been the practice in actions for personal injuries to aver specially damages would accrue from loss in the future of earning capacity." [Citing Bartley v. Trorlight, 94 Mo. App. 214, 218.]

And in Ingles v. Railroad, 145 Mo. App. l. c. 247, 129 S. W. 493, it is said: "The petition alleges: 'That by reason of said injuries he has suffered and will continue to suffer great bodily pain and mental anguish; that he has lost a great deal of time on account of said injuries, has been unable to obtain employment by reason thereof, and is permanently injured and crippled as a result of said injuries' . . . Though the petition does not expressly allege loss of earnings in the future, the allegations quoted bring the issue of such damages within the rule announced by this court in Goodloe v. Railway, 120 Mo. App. l. c. 202, where we said 'to allege that plaintiff's ability to earn money has been impaired, coupled with the statement that the cause that produced that result is permanent, is the assertion of the fact that the impairment likewise is permanent and, therefore, raises the issue of a perma-

Digitized by Google

nent deterioration in earning capacity and satisfies the rule that loss of earnings, being in the nature of special damages, must be specially pleaded.' "

Upon the authority of these cases we think that this assignment of error should be ruled against the appellant.

V. Another assignment of error pertains to the fifth instruction given for plaintiff which deals with defendant's duty as a master, and the risks assumed by plaintiff in the premises. But we need not dwell upon this, for it is clear that if there are any imperfections in this instruction they were cured by instructions given for defendant which fully covered the matters referred to in plaintiff's said instruction.

VI. The amount of the verdict, to-wit, six thousand dollars, is challenged as being excessive. In falling, plaintiff's body struck the pump, at the bottom of the pit, causing an injury to the lower part of his spine. Plaintiff testified that he was confined to his bed for a period of about forty-four days; and after that it seems that he went upon crutches up to the time of the trial below, except for a short period when he says that his condition improved somewhat. As to this, a portion of plaintiff's testimony, as contained in the record, is as follows: "When the time came that I could get out of bed, I used crutches; of course I got so I could get about tolerably well without crutches, but never been so I could straighten up, never been without pain; I can't show the jury now how I walked without crutches, I can tell them; in getting up and down, if I got down on the ground I have to use my hands to pry myself up, that is if I squat plum down; I got so I could get around pretty well, I could never lift anything that would amount to anything; of course my left leg has always been numb, I can't use it right, I have never been so that I could use it good at all; as a usual thing in trying to get around I brace myself on that thigh.

Digitized by Google

Cannot get up and walk down without my crutches. Commenced getting better in May and got along good, a right smart better up until along in July."

Seven physicians testified at the trial, two of them for plaintiff and five for defendant, three of the latter having been appointed by the court to make a physical examination of plaintiff. The testimony of the medical experts adduced in plaintiff's behalf went to show that he was suffering from "chronic myelitis," which is said to be a disease of the nerve substance of the spinal cord, and which may be produced by or result from an injury to the spine such as it appears plaintiff received; that shock or injury is the common cause thereof; and that it impaires the functions of the muscles of that part of the body which are under the control of the nerves which emanate from the section of the spinal cord involved, causing at least a partial paralysis of such portions of the body; and that in plaintiff's case the voluntary muscles of his legs were impaired so that he could not command the use of the latter.

One of these physicians stated: "Chronic myelitis always grows worse after a while; it improves for a time; in a short while after the injury is sustained it begins to show signs of improvement, the length of time it would show evidence of improvement is indefinite; may go as long as six months or a year; always grows worse after that." This would account for the period of improvement in plaintiff's condition to which he testified. Both of these witnesses were of the opinion that plaintiff's condition would be permanent—that there was no probability that it would improve in the future.

Defendant's medical testimony was very much to the same effect. The three physicians appointed by the court all thought that there would be a permanent impairment of plaintiff's power of locomotion. Two of them thought that plaintiff had some disposition to

Digitized by Google

exaggerate his symptoms, but one could not say that he saw any such tendency. One of them said: "I regard his injury as a permanent one; regard it as a serious injury so far as locomotion is concerned; his power to walk is permanently impaired, but not completely." And another said: "I regard his injury as a serious and permanent injury."

It appears that plaintiff, at the time of the trial below, was thirty-six years of age, in full possession of his faculties, and a strong man physically, and that he had been earning from forty-five to fifty-five dollars per month, at what may be termed manual labor.

In view of the testimony to which we have alluded above, it is altogether clear that we would not be justified in declaring the verdict excessive. There is ample evidence to support a recovery to the amount of the verdict. And whether plaintiff was exaggerating the extent of his injuries, and was really less injured than he professed to be, as appellant seems to think, was a question to be considered and determined by the jury.

It follows that the judgment below should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

SAMUEL GRAY et al., Respondents, v. WABASH RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **MASTER AND SERVANT: Railroads: Injury to Servant: Assigning Minor Forbidden Work: Sufficiency of Evidence.** A railroad station agent directed an infant servant under him to get a hoop which the agent had utilized to deliver a message to a moving train, and the servant, while running along the station platform, with the train, to get the hoop, collided with a semaphore post on the platform, causing him to be thrown under the train and killed. It was the custom to pick up the hoops after they were thrown from the train and

Digitized by Google

the employees were not expected to keep pace with a moving train to get the hoops before they were thrown off, nor was any order to that effect given to decedent at the time of the accident. *Held*, that decedent was not required by defendant railroad company to work about moving trains contrary to his parents' direction, and hence a recovery could not be had on such ground.

2. **NEGLIGENCE: Contributory Negligence: Foundation: Maxims.** The doctrine of contributory negligence is founded upon the maxim, "*In jure non remota causa sed proxima spectatur.*"

3. **———: Contributory Negligence of Children.** The standard by which the negligence of a child is to be measured is not the degree of care to be reasonably expected of an ordinarily prudent man, but the degree of care to be reasonably expected of a child of his age; but where he is fully able to comprehend a danger, he may be declared guilty of negligence as a matter of law for failing to avoid it.

4. **———: ———: Facts Stated.** A railroad station agent directed an eighteen-year-old boy working under him to get a hoop which the agent had utilized to deliver a message to a moving train, and the boy, while running along the station platform, with the train, to get the hoop, collided with a semaphore post on the platform, situated about one hundred feet from his starting point, causing him to be thrown under the train and killed. *Held*, that decedent could have avoided running against the post, by the exercise of ordinary care, and hence he was guilty of negligence as a matter of law, barring a recovery for his death by his parents.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett,* Judge.

REVERSED.

J. L. Minnis and *Robertson & Robertson* for appellant.

Under all the evidence, the court should have directed a verdict for the defendant and the court erred in refusing the defendant's peremptory instructions offered at the close of the plaintiffs' evidence and at the close of all the evidence. (A) The evidence failed to show that Hampton gave any order at all, and if so,

Digitized by Google

there was no evidence it was addressed to the decedent. This was a total failure of proof. (B) And the evidence showed that Hampton and the decedent were fellow servants. Labatt on Master & Servant, sec. 512; McGowan v. Railroad, 61 Mo. 528; Blessing v. Railroad, 77 Mo. 410; Sheehan v. Prosser, 55 Mo. App. 569; Shaw v. Construction Co., 102 Mo. App. 666, 670-671; Smith v. Foundry Co., 122 Mo. App. 610. And therefore Hampton had no authority to order the decedent to get the hoop and in so doing was acting beyond the scope of his authority and defendant is not liable therefor. Overton v. Railroad, 111 Mo. App. 613. (C) Furthermore, it was not negligence for Hampton to order decedent to get the hoop. 21 Am. & Eng. Ency. Law (2 Ed.), p. 471. (D) The collision of decedent with the post was the direct and proximate result of his own lack of ordinary care. Frauenthal v. Gas Light Co., 67 Mo. App. 1; Coleman v. Land & Lumber Co., 105 Mo. App. 272; Butterfield v. Forrester, 11 East, 60. Sargent v. Railroad, 114 Mo. 348. (E) Decedent's act in colliding with the post was intervening and disconnected from Hampton's order and not the proximate result thereof, so no recovery can be had. Railroad v. Kellog, 94 U. S. 469; Anderson v. Railroad, 70 S. C. 490, 50 S. E. 202; Bridge Co. v. Seeds, 144 Fed. 605.

H. S. Booth and *Barclay, Fauntleroy, Cullen & Orthwein* for respondent.

(1) Hampton was the defendant's station agent, entrusted at the time with the master's power of control, delivered to the trainmen the messages which controlled the train's movement and represented defendant, and deceased was subject to his orders, and hence Hampton was a vice principal. Dayharsh v. Railroad, 103 Mo. 576; Smith v. Railroad, 92 Mo. 359; Moore v. Railroad, 85 Mo. 588; Stoddard v. Railroad, 65 Mo.

Digitized by Google

514; Cox v. Granite Co., 39 Mo. App. 424; Evans v. Railroad, 62 Mo. 49. (2) An employee entrusted with the duty of instructing a young and inexperienced servant has been held to be a vice principal upon the ground that the duty to instruct is that of the master. Wallace v. Standard Oil Co., 66 Fed. 260; Lebbering v. Struthers, 157 Pa. St. 312; Ingerman v. Moore, 90 Cal. 410; Newbury v. Getchel, etc., Co., 100 Iowa, 441; Minneapolis v. Lundin, 58 Fed. 525. (3) The age and inexperience of the deceased minor are material elements which should be considered on the issue of contributory negligence. The same standard of care that is applied to an experienced adult cannot be applied to a minor without experience. Obermeyer v. Mfg. Co., 120 Mo. App. 59; Rogers v. Printing Co., 103 Mo. App. 683; Campbell v. Railroad, 175 Mo. 161. (4) The action of the deceased must be judged in the light of the circumstances as they appeared to him at the time, and the order and its confusing effects are material factors which would cause an ordinarily prudent person to act as the deceased acted. Kleiber v. Railroad, 107 Mo. 147; Ephland v. Railroad, 57 Mo. App. 147; Dellemand v. Saalfeld, 175 Ill. 310. (5) Obedience to an order involving personal danger cannot be declared negligent as a matter of law, where, when as in this case, the danger was not so glaring as to clearly indicate danger to a prudent person. Schroeder v. Railroad, 108 Mo. 323; Stephens v. Railroad, 96 Mo. 207. (6) The defendant was guilty of putting an inexperienced boy at a dangerous employment against the will and contrary to the express orders of his father, and there was no valid contract of hire for this particular work as between the plaintiffs and the defendant, and the relation of master and servant between the boy and the defendant did not exist. In such circumstances the defendant would be liable for the death of the boy, unless it should be shown that his injury and death were the result of his own willful act. Coleman v. Land & Lum-

Digitized by Google

ber Co., 105 Mo. App. 254; Union P. Co. v. Fort, 17 Wall. 553; Coal Co. v. Haenni, 146 Ill. 614; Cole v. Railroad, 71 Wis. 114; Egan v. Lumber Co., 94 Wis. 137; Mann v. Print Works, 11 R. I. 152; Robertson v. Cornelson, 34 Fed. 716; Railroad v. Bayfield, 37 Mich. 205; Foley v. Horseshoe Co., 115 Cal. 184; Erickson v. Railroad, 83 Mich. 281; Orman v. Mannix, 17 Colo. 564; Coal Co. v. Gaffney, 119 Ind. 455; Kehler v. Schwenk, 151 Pa. 519; Jones v. Cotton Mills, 82 Va. 140; Newbury v. Lumber & Mfg. Co., 100 Iowa, 441; Beet-Sugar Co. v. Hight, 59 Neb. 100; Railroad v. Newman, 64 S. W. 790.

ALLEN, J.—This is an action by plaintiffs, husband and wife, for the death of their minor unmarried son, alleged to have been caused by the negligence of the defendant railroad company. Plaintiffs recovered and the defendant prosecutes the appeal.

This is the second appeal of the case. The opinion of this court on the former appeal will be found under the style of Gray v. Railroad, in 157 Mo. App. 92, 137 S. W. 324. Plaintiffs' son at the time of his death was about eighteen years and eight months of age, and resided with his parents in Centralia, Missouri. It appears that a written contract of employment had been entered into between plaintiffs, the parents of the deceased, and the defendant, the latter's regular form of employment contract being utilized for such purpose; but it appears that the deceased's duties were to act as a messenger for the Western Union Telegraph operator at this station, who was also employed by the defendant to handle its train messages. Defendant's station agent also paid him a small sum per month for sweeping the station every morning.

On behalf of plaintiff there was testimony to the effect that there was an oral agreement between the boy's father and defendant's station agent, to the ef-

Digitized by Google

fect that the boy was to "have nothing to do with the train service whatever," and would not be required to work about the trains.

At the time of the injury and death of plaintiffs' said son, the defendant maintained at this place a long platform extending some three hundred feet along and north of its railway tracks, in front of its station, and which was perhaps about sixteen feet in width. The tracks extended nearly east and west. In this platform stood a semaphore pole about twenty-five feet high, at the top of which were arms to be used for signalling purposes. It appears that this post stood nearly five feet from the outer or south edge of the platform, and about eleven feet from the depot building, directly in front of the telegraph office.

On September 28, 1908, an eastbound freight train of defendant approached and was passing the station and platform at this place at a rate of speed that is estimated at from six to ten miles per hour. It appears that orders were to be passed to the trainmen on this train by means of wire hoops; it being customary to deliver orders in this way to passing trains, the same being fastened to the hoops and the latter held aloft in order that someone on the train might catch them by running his arm therethrough, the hoops being thrown off upon the platform or premises near-by after the orders had been taken therefrom.

Upon the day in question, one Hampton, appellant's agent, was standing upon the platform about one hundred feet west of the semaphore pole, with two of these hoops to be used to thus transmit orders to the crew of the passing freight train. Standing near him were the deceased, one McBride who was the baggage man at this place, and one Montgomery. It appears that Hampton held one of the hoops aloft and it was caught by the brakeman on the train who stood in the "gangway" back of the engine; and plaintiffs' witnesses testified that as this was done, and while Hamp-

Digitized by Google

ton was looking toward the train, he said: "Get the hoop." The testimony is that this order was spoken in an ordinary tone of voice, with nothing to indicate to whom it was directed. Deceased, however, apparently understood that it was directed to him. He thereupon ran east along the platform after the hoop which was then in the hands of the brakeman on the passing train, who was taking the order therefrom. Deceased thus ran, following the train, the aforesaid distance of about one hundred feet, when he collided with the semaphore pole, whereby he was thrown against and fell beneath the passing train and was killed.

When the case was here before, it was reversed for the reason that plaintiffs undertook to make a case under section 5425, Revised Statutes 1909, and this court held that the petition stated no cause of action under that section. Upon motion of respondents there, the judgment of reversal outright was modified, and the cause was reversed and remanded for further proceedings.

Learned counsel for respondents now contends that this court, on the former appeal, adjudged that plaintiffs' case fell within section 5426, Revised Statutes 1909, and that, when properly presented, the case was one for the consideration of the jury, and that such is now the law of this case. A reading of the former opinion, however, will readily disclose that nothing was there adjudicated except that plaintiffs had no cause of action under section 5425, supra, under which plaintiffs were then attempting to proceed; and that the case was not considered upon the merits.

A recovery is sought in part upon the theory that defendant committed an actionable wrong by imposing upon plaintiffs' deceased minor son duties not within the scope of the contract of hiring made with the father, in that deceased was permitted to perform duties about moving trains, and in part upon the theory that it was

Digitized by Google

negligence on the part of defendant's station agent to give the order to "get the hoop" under the circumstances aforesaid, which is alleged to have been given suddenly and abruptly, whereby plaintiffs' son was startled, confused and alarmed, and that the order was one that required instant and sudden execution, and that in executing the same it would be natural and probable that deceased would run after the hoop, keeping his eye upon it, and thus run against the semaphore pole and be injured.

Much of the argument in appellant's brief pertains to the question whether plaintiffs can have any right of action under section 5426, supra, growing out of the alleged violation of the contract of employment as aforesaid; appellant's position being that such wrongful act, if any, is not one which would have entitled the deceased to maintain an action therefor, if death had not ensued, and that therefore such right of action, if any, would not survive to plaintiffs.

We deem it unnecessary to discuss this phase of the case, however, for we find no evidence in the record whatsoever tending to show that the defendant assigned to or imposed upon deceased any duties outside of the scope of the contract of hiring, or placed him at work about the moving trains against his father's directions. There is absolutely nothing to show that, at any time prior to the accident, defendant had assigned to plaintiffs' son, or requested him to perform, such an undertaking as he was engaged in at the time he met his death, to-wit, running along with a moving train for the purpose of getting a hoop, or other object, or that he was required to work about the trains at all. The record shows that these hoops were passed to moving trains and thrown off from the latter, and later picked up by employees and others and returned to the office. And if deceased was theretofore expected to thus pick them up, as did other employees, it did not require him to work about the moving trains.

Digitized by Google

Such was the custom with respect to getting these hoops, and if any employee was ever expected to try to keep pace with a moving train to get the hoops before they were thrown off, this record wholly fails to reveal it. And so far as concerns that which took place on the occasion in question, the evidence fails to show that defendant's agent assigned to deceased the task of pursuing the moving train. Plaintiffs' evidence is that what the station agent said, was merely "get the hoop;" those words being spoken by him in an ordinary tone of voice and while he was looking toward the brakeman on the train to whom he passed the hoop. This alone, in the face of the fact that the hoops were intended to be thrown from the trains and picked up from the platform or ground, and that such was the invariable custom, so far as the evidence reveals, and with absolutely nothing else appearing in the record, cannot be taken as an intentional assignment to deceased of the task of pursuing the train and getting the hoop in a manner not shown to have been ever theretofore expected of anyone, or to have ever been attempted, to-wit, by pursuing the train and receiving the hoop before it was thrown off—an altogether unnecessary and useless task.

Plaintiffs' evidence fails to reveal anything more on this score than what we have indicated above. And defendant's evidence did not help plaintiffs' case in this regard, but on the contrary went very strongly to show that such manner of getting the hoops was not expected or contemplated by anyone. Indeed, defendant's brakeman testified that he could not make out what the boy wanted when he saw the latter running near the train and reaching up his hand as the brakeman was taking the order from the hoop.

Plaintiffs' case must rest upon the alleged negligence of defendant's agent in giving the "order" in question, under circumstances which might lead the deceased to suppose that he was to pursue the train; not

Digitized by Google

that the latter was thereby purposely assigned a hazardous task, but that it was negligence on the part of the agent to speak these words when and as he did. It is by no means clear that the evidence can be said to at all sustain plaintiffs' theory in this regard. The testimony does not show a sudden and abrupt order given as plaintiffs contend, such as was likely to cause deceased to become startled, confused and alarmed thereby. On the contrary, the only testimony relating to this question is that what was spoken was said in an ordinary tone of voice, and was apparently addressed to no one in particular. And besides, it is difficult to see how it can be said that defendant's agent "knew or might have known by the exercise of ordinary care, . . . that in executing said order it would be natural and probable" that deceased would run against the post and thereby be injured or killed by the passing train, as plaintiffs' allege in their petition and count upon to sustain their cause of action.

But be this as it may, deceased, as we have said, was nearly nineteen years of age, and it appears that he was an intelligent youth, and was entirely familiar with the semaphore post and its location, for he had been working about it for several months. The post itself, it seems, was a substantial one, some twenty-five feet high, and standing in plain view. It was located out in the platform about eleven feet from the wall of the depot building, in order that it might not be hidden from the view of those in charge of west bound trains by a water tank situated a little east of the platform.

When deceased started after the hoop, he was, according to the testimony, about one hundred feet away from the post. He ran this entire distance, and then, evidently without looking, or taking the slightest heed as to where he was going, ran blindly and headlong into the post. Such being the case we see no es-

Digitized by Google

cape from the conclusion that he was guilty of such negligence as to preclude a recovery by plaintiffs.

In Wheat v. St. Louis, 179 Mo. l. c. 581, 582, 78 S. W. 790, where plaintiff was injured by driving upon an obstruction in the street, our Supreme Court said:

"In short the rule is supported not only by the almost universal trend of authority, both English and American, but also by the plainest principles of right and justice. While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty . . . not to run into obstructions that he is familiar with *or which, by the exercise of ordinary care, he could discover and easily avoid.* And while the city may be negligent in the discharge of its duty, the citizen may also be negligent in the discharge of his duty. And if both are negligent and their negligence contributes to the injury, there can be no recovery. And if the plaintiff's negligence necessarily contributed to the happening of the injury, there can be no recovery."

To the same effect are: Kaiser v. St. Louis, 185 Mo. l. c. 374, 84 S. W. 19; Coffey v. City of Carthage, 186 Mo. l. c. 585, 85 S. W. 532; Cohn v. City of Kansas, 108 Mo. l. c. 393, 18 S. W. 973; Woodson v. Street Ry. Co., 224 Mo. 685, 123 S. W. 820; Ryan v. Kansas City, 232 Mo. 471, 134 S. W. 566, 985; Border v. Sedalia, 161 Mo. App. 633, 144 S. W. 161; Yahn v. City of Ottumwa, 60 Iowa, l. c. 433.

Such is undoubtedly the rule with respect to the duty devolving upon a traveller upon the highway, and *a fortiori* would it be the duty of one in the position of deceased, thoroughly familiar with the premises in question, not to run into obstructions, in broad daylight, with which he is familiar and which are plainly obvious to him, and which he may easily avoid by the exercise of ordinary care. [In this connection see Loring v. Railroad, 128 Mo. 359, 31 S. W. 6; Fore v. Railroad, 114 Mo. App. 551, 89 S. W. 1034.]

Digitized by Google

The doctrine of contributory negligence is founded upon the maxim, "*In jure non remota causa sed proxima spectatur.*" Here we think it quite clear that the proximate cause of deceased's unfortunate injury and death was not the act of defendant's agent in question, if that can be said to be negligence, but was the act of the deceased in negligently running against the pole, whereby he was precipitated under the moving train. That he could have avoided the danger by the exercise of ordinary care is quite apparent. And the law required that he exercise such care for his own safety. Applicable to such a situation as this is the early and well-known English case of Butterfield v. Forrester, 11 East, 60, where the plaintiff, about dusk, drove upon an obstruction in the street, and was injured; and it was held that if plaintiff could have seen the obstruction and have avoided his injury by the exercise of ordinary care, he could not recover. Such is our law today.

Had deceased, upon an unusual order being suddenly given him, become confused and alarmed, and, turning suddenly to execute the same, been injured because of some near-by defect or obstruction in the platform, which he had thus been caused to overlook, there might be some room for such a contention as is here made. But such was not the case. Deceased ran headlong for a distance of approximately one hundred feet, and, without looking in the direction in which he was proceeding, ran into the semaphore pole.

It may be said that the standard by which deceased's negligence is to be measured is not the degree of care to be reasonably expected of an ordinarily prudent man, but the degree to be reasonably expected of an ordinarily prudent youth of his age. [See Moeller v. United Rys. Co., 242 Mo. 721, 147 S. W. 1009.] But it cannot be doubted that he was fully able to comprehend the danger from running into such an obstacle as he did, and that under the circumstances he may

Digitized by Google

properly be declared guilty of negligence as a matter of law. [See McNulty v. Railroad, 166 Mo. App. 439,148 S. W. 973; McGee v. Railroad, 214 Mo. 530, 114 S. W. 35; Herdt v. Koenig, 137 Mo. App. 589, 119 S. W. 56; Hight v. Bakery Co., 168 Mo. App. 431, 151 S. W. 776; Battles v. United Rys. Co., 178 Mo. App. 596.]

For the reasons given above, the judgment should be reversed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

C. VALLEROY, Respondent, v. JOHN J. ENRIGHT, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **REFERENCE: Compusory Reference: Right to Accept Part and Reject Part of Report.** Notwithstanding an order of reference, in an action at law requiring the examination of a long account, is made by consent, yet, in view of the fact that such an action is the subject of compulsory reference, under Sec. 1996, R. S. 1909, the trial court may review the report of the referee and confirm it in part and reject it in part; it being only in actions at law that are not the subject of a compulsory reference that the court must either accept or reject the report *in toto*.

2. ———: **Account: What Constitutes.** The mere fact that certain items set forth in a counterclaim accrue as damages for the breach of a building contract because of defective materials and inferior workmanship does not remove them from the category of the account contemplated by Sec. 1996, R. S. 1909, relating to the reference of causes, since they sound in contract.

3. **JURY: Right of Trial by Jury: Compulsory Reference.** In cases of compulsory reference, under Sec. 1996, R. S. 1909, the right of trial by jury does not obtain as in other actions at law, since the right and power to make the reference inhered in the court by statute antedating our present constitutional provision, preserving the right of trial by jury inviolate to parties litigant as it had theretofore existed.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

Digitized by Google

AFFIRMED.

Charles P. Comer for appellant.

The motion in arrest should have been sustained. This being a reference by consent of the parties, the court had no power to set aside the referee's report, in part, and sustaining it as to part, but should have rejected it as a whole, or affirmed it as such. Clark v. Phillips, 99 Mo. 550; Lingenfelder v. Wainwright Brewery Co., 103 Mo. 578; Kansas City H. P. B. Co. v. Pratt, 114 Mo. App. 643.

Johnson, Rutledge & Lahsly and *R. L. Ailworth* for respondent.

(1) This is not a reference by consent, but one by order of court under the statute. (2) This being a reference under the statute, the court had the power and authority to review both the findings of fact and law, or either, made by the referee, and the court acted within its authority in this case. Lock v. Breck, 166 Mo. 242; West v. Bank, 110 Mo. App. 290; Kansas City Hydraulic Press Brick Co. v. Pratt, 114 Mo. App. 643; Lingenfelder, etc., v. Wainwright Brewing Co., 103 Mo. 578; Wentzville Tobacco Co. v. Walker, 123 Mo. 662; Williams v. Santa Fe R. R. Co., 153 Mo. 495.

NORTONI, J.—This is a suit on an account for extras furnished in the erection of a building. The finding and judgment were for plaintiff, and defendant prosecutes the appeal.

Plaintiff is a contractor and builder and as such erected a house for defendant under a written contract with him. Some changes were had in the plans as the work progressed and numerous extra charges were made by plaintiff therefor. This suit proceeds on an account setting forth a long list of items for extra work done. Defendant denied liability on account of

Digitized by Google

such charges and averred the extra items for which the suit proceeds were within the contract between the parties. Further answering, defendant interposed a counterclaim against plaintiff and set forth a long list of items wherein it is said plaintiff breached the building contract through defective workmanship and in installing defective materials. Both the account sued upon for the extra work said to have been done and the counterclaim seeking a recovery against plaintiff as for breaches of the contract detail long lists of items in dispute between the parties. The damages prayed for in the counterclaim on account of the breaches of contract are itemized, too, as if they are matters of account between the parties. The court referred the case, as one involving a long account under the statute, to Mr. E. G. Curtis, a member of the St. Louis bar, and directed him to hear the evidence and report thereon. It is said the parties consented to the reference so made, but the order of the court touching that matter reveals no more than that they consented to the referee who was appointed. But be this as it may, we regard the matter of the consent of the parties immaterial, for the case was obviously one for a compulsory reference.

After hearing the evidence, the referee filed his report and recommended a considerable judgment for plaintiff—that is, the referee found for defendant on a number of the items of his counterclaim, rejected others, and recommended a judgment for plaintiff as the balance due on his account, after deducting the allowances in favor of defendant on the counterclaim. Exceptions were filed to this report in due time and the court sustained them in part and found a net balance due plaintiff in the amount of $46.37, after deducting all claims allowed on the counterclaim in favor of defendant. For this amount—$46.37—judgment was given in favor of plaintiff. Defendant prosecutes the appeal and complains alone of the action of the

Digitized by Google

court in rejecting the referee's report and finding and giving judgment for an amount different from that recommended by the referee.

It is said the court erred in this, for that the suit is one at law on an account, in which the reference was had by consent of parties. Therefore, it is urged the report of the referee stands as a verdict and is to be accepted or rejected by the court in its entirety and may not be reviewed and confirmed in part and rejected in part. Though it be that the parties consented to the reference here, it is entirely clear that the cause was one in which the court was authorized to direct a reference without consent. The pleading on the part of plaintiff reveals an extended account consisting of many items for extra work performed on defendant's building. Defendant's counterclaim sets forth many items and prays a recovery therefor on the theory that plaintiff has breached the building contract with respect to all of them and thus occasioned damages in the amount set opposite thereto. The mere fact that these items set forth in the counterclaim accrue as damages for the breach of a contract because of alleged defective materials and defective and inferior workmanship in constructing the building does not remove them from the category of the account contemplated by the statute, for it is obvious they sound in contract. [See Ittner v. St. Louis Exposition, etc. Co., 97 Mo. 561, 11 S. W. 58.]

The statute (Sec. 1996, R. S. 1909) authorizes the court, even though the parties do not consent thereto, to refer a case where the trial of an issue of fact shall require the examination of a long account on either side. It is obvious the pleadings reveal a long account between the parties and the case was a proper one for compulsory reference—that is to say, for a reference by the court of its own motion, and this, too, without the consent or over the objection of the parties. [See Ittner v. St. Louis Exposition, etc. Co., 97 Mo. 561, 11

Digitized by Google

S. W. 58; Smith v. Haley, 41 Mo. App. 611.] In such cases, the right of trial by jury does not obtain, as in other suits at law, because it is said the right and power to make the reference inhered in the court by statute antedating our present constitutional provision preserving the right of trial by jury inviolate to parties litigant as it theretofore existed—that is, before the adoption of the Constitution. [See Creve Coeur Lake Ice Co. v. Tamm, 138 Mo. 385, 39 S. W. 791.]

In this view, the court may dispense with a jury entirely and order a reference, in cases involving a long account, and on the coming in of the referee's report, review it and exercise its judicial discretion with respect to the matter of approving or rejecting it either as to the whole or in part. In other words, the court may make its own finding on a review of the facts of the case, by accepting a portion of the referee's report and rejecting the remainder, or through rejecting the entire report and making a finding of facts according to its own views in the premises. This is true, too, in such cases, though it be that the parties consented to the reference, for the character of the case is not changed, and the power of the court over it is not abated, in so far as this matter is concerned, by the mere fact of the consent yielded by the parties to the reference. [See Williams v. Chicago, etc., R. Co., 153 Mo. 487, 54 S. W. 689; Lack v. Brecht, 166 Mo. 242, 65 S. W. 976; Wentzville Tobacco Co. v. Walker, 123 Mo. 662, 27 S. W. 639.] However, the right of the court to thus review and correct the findings of fact by a referee on the evidence is confined to those cases where a compulsory reference may be directed under the statute—that is, without the consent of the parties—and to suits in equity where the parties have consented to the reference. [Caruth-Byrnes Hardware Co. v. Wolter, 91 Mo. 484, 3 S. W. 865.] Therefore, it is only in suits at law which are not the subject of a compulsory reference under the statute that the court

Digitized by Google

is concluded by the referee's finding of fact as if it were a verdict and is required to accept or reject it in *toto*. [See Caruth-Byrnes Hardware Co. v. Wolter, 91 Mo. 484, 3 S. W. 865.]

Here, the case was a proper subject for reference without the consent of the parties, and the mere fact that they consented thereto avails nothing against the power of the court to review the findings of the referee and correct them as appeared proper.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

J. M. DUNHAM, Respondent, v. PHILADELPHIA CASUALTY COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **EMPLOYERS' LIABILITY INSURANCE: Policy Construed: Right to Incur Expense for Surgical Relief.** An employer's liability policy provided that insured should not incur any expense, other than for imperative surgical relief for an injured employee at the time of the accident. *Held*, that it would seem that "imperative surgical relief" involves not only the calling of a surgeon to administer temporary relief while the injured employee is unconscious, but also involves treatment administered during the ensuing two or three days to abate swellings and set fractured bones and ascertain the extent of the injuries through the use of the X-ray.

2. ———: **Powers of Adjuster.** An adjuster of an employers' liability insurance company, authorized to ascertain the extent of the injuries, to take steps to minimize the loss, and to settle the claim, has sufficient power to authorize insured, whose employee was injured, to continue to provide medical services for him.

3. ———: **Recovery of Surgeon's Fees: Condition Precedent.** Under a provision of an employer's liability policy, that no action shall lie against insurer for any loss or expense, unless brought by insured to reimburse him for loss or expense paid after a trial of the issues, or unless the payment shall have been made with the written consent of insurer, it is a con-

Digitized by Google

dition precedent to a recovery of expenses incurred by insured that the payment be not made until after a trial of the issues, or with the written consent of insurer.

4. **APPELLATE PRACTICE: Conclusiveness of Trial Court's Finding.** In a case tried to the court, where no instructions are given or refused, the finding will not be disturbed, on appeal, if it can be sustained upon any theory supported by the evidence.

5. **EMPLOYERS' LIABILITY INSURANCE: Recovery of Surgeon's Fees: Waiver of Conditions Precedent.** A provision of an employer's liability policy, that no action shall lie against insurer for any loss or expense, unless brought by insured to reimburse him for loss or expense paid after a trial of the issues, or unless the payment shall have been made with written consent of insurer, being for the benefit of insurer, may be waived by it; so that where an insured paid the bill of a surgeon, whose services had been authorized by insurer's adjuster, without his having brought suit for it and without the written authorization of insurer to pay it, but insurer, after insured had demanded reimbursement, mailed him a check for a smaller amount, as though it was liable therefor, it waived compliance with the conditions precedent set out in said provision.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

AFFIRMED.

Charles E. Morrow for appellant.

(1) The policy provided that assured should not "incur any expense other than for imperative surgical relief at the time of an accident." It also provided: "No action shall lie against the company as respects any loss or expense under this policy unless it sahll be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him after trial of the issue or unless payments shall have been made with the written consent of the company." These provisions constitute conditions precedent and are substantial parts of the policy. O'Connor v. Columbia Insurance Company, 152 S. W.

Digitized by Google

396. (2) The policy in question only agrees to indemnify the assured against loss or damage by reason of liability imposed by law and expense of first aid treatment and under it the insurance or indemnity does not attach or become available until the assured has paid the loss or expense as provided in the policy according to its terms. Allen v. Aetna Life Insurance Co., 145 Fed. 181. (3) The clause in the policy in question was intended to and did limit the liability of the company to damages or expenses incurred to be ascertained by due course of judicial procedure and paid in money or paid with the written consent of the company. Its purpose was to prevent collusion between the assured and doctor. Allen v. Aetna Life Insurance Co., 145 Fed. 181, 7 L. R. A. N. S. 985 and note. Connolly v. Bolster, 187 Mass. 266; Mining Co. v. Casualty Co., 143 Mo. App. 562-563.

Paul V. Janis for respondent.

(1) Where the policy stipulates that the insured may provide immediate surgical relief, the insured is constituted the agent of the insurer for the purpose of calling medical attendance in the case of emergency and the liability so incurred is independent of the other obligations of the policy. Kelly v. Maryland Casualty Co., 89 Minn. 337. The liability becomes fixed, moreover, as soon as surgical relief is provided. Fenton v. Fidelity & Casualty Co. of New York, 48 L. R. A. 770. If there should be any doubt as to the proper construction to be given the terms of an employer's liability policy, it is the duty of the court to construe it most strongly against the insurance company, where the provisions are put in the policy at the direction of the company and for its protection and benefit. Mining Co. v. Casualty Co., 143 Mo. App. 555. (2) The rule of construction that an uncertainty respecting the meaning of the terms of an insurance contract must be

Digitized by Google

determined in favor of that interpretation favoring the assured, even though otherwise intended by the insurer, has received the sanction of the courts of Missouri. Columbia P. S. Co. v. Fidelity & Casualty Co., 104 Mo. App. 168; Cunningham v. Union Casualty Co., 82 Mo. App. 614. (3) By sending its check for forty dollars to plaintiff, defendant construed the policy to mean that plaintiff had the right to pay the doctor, and waived any objection to said payment. The practical construction given by the parties to a written contract is a potent factor in determining its meaning. St. Joseph Union Depot Co. v. Chicago R. I. Ry. Co., 131 Mo. 291; Casualty Co. v. Mesker, 128 Mo. App. 205.

NORTONI, J.—This is a suit on a policy of employers' liability insurance. Plaintiff recovered and defendant prosecutes the appeal.

The principal argument urged for a reversal of the judgment goes to the effect that the amount sued for, though paid out by plaintiff on account of an injury to one of his employees, may not be recovered in this suit on the policy, for the reason the claim was not ascertained after trial of the issue before the payment was made. Though it is clear enough that the policy imposes this as a condition precedent to the right of recovery thereon, it seems the provision may be treated as waived by defendant in the instant case and the judgment supported on that ground.

It appears plaintiff is a contractor and builder and as such took out the insurance policy involved here. The insurance is of that character known as employers' liability, and the policy vouchsafes indemnity to the assured, under the limitations therein prescribed and not exceeding a specified amount, against such losses as he may sustain and pay after a trial of the issue on account of injuries received by persons in his

Digitized by Google

employ who are included within the terms of the contract. The policy provides that the company shall undertake, at its own cost, the defense of all suits against the insured which may be prosecuted against him on account of injuries received by his employees and provides further that the insured shall render assistance in securing information touching such controversies and the evidence thereon, attendance of witnesses, effecting settlements, etc. But it provides, too, that the insured shall not, "without the written consent of the company, interfere in any negotiation for settlement nor in any legal proceedings, nor incur any expense other than for imperative surgical relief at the time of an accident." In the latter clause just quoted, there is obviously implied authority granted on the part of defendant company to the insured to incur expense for imperative surgical relief at the time of an accident and this much seems to be conceded in the case.

The instant suit proceeds for the recovery of $125, a surgeon's bill paid by plaintiff to a physician and surgeon for treating a carpenter who was injured while in plaintiff's employ. While erecting a building in St. Louis, a carpenter, employed by plaintiff and within the terms of the policy, fell from the building to the earth below and thereby received severe and dangerous injuries. It appears both of his arms and three ribs were fractured. Furthermore, the carpenter, Buckner, was rendered unconscious by the fall and for several days thereafter was in a dangerous condition. Plaintiff called a physician and surgeon immediately to treat and care for the injured man. The evidence reveals that Buckner's condition was such that his fractured bones could not be set on that day and that considerable swelling of the parts ensued. The surgeon took immediate charge of the patient and administered forthwith temporary treatment. On the following day, the services of an X-ray specialist were obtained by the surgeon and on that and the third day

Digitized by Google

the fractures were all properly reduced and treated. Plaintiff immediately notified defendant company concerning the matter and it sent its adjuster to investigate and settle the claim. On being advised of the serious condition of Buckner, the carpenter, the adjuster instructed plaintiff to continue the services of the doctor, which he did until proper recovery was had. Thereafter, the adjuster settled the entire claim of the carpenter for $35 but the doctor's bill was not paid. The surgeon, Dr. Say, who was called by plaintiff and who treated Buckner, rendered his account to plaintiff for $125, which the evidence reveals to be a reasonable charge. Plaintiff paid this bill to the surgeon and transmitted it to the defendant company who sent him a check for $40 as if in full for its liability on that account. Plaintiff immediately returned the check to the company and instituted this suit on the policy to recover the $125 so paid out by him in compensation for the services of the physician and surgeon.

It is suggested in the briefs, but not pressed with vigor, that plaintiff was not authorized to contract an indebtedness chargeable to defendant beyond what is known as for first aid, or in the language of the policy, "other than for imperative surgical relief at the time of an accident." It is entirely clear that plaintiff is authorized to incur an expense chargeable to defendant under the terms of the policy for imperative surgical relief at the time of an accident, and it would seem that such imperative surgical relief involved, not only the calling of a surgeon to administer temporary relief while the man was unconscious, but involved, too, the treatment which followed during the ensuing two or three days which was administered to abate the swelling and compass the extent of the injuries through the use of the X-ray and reducing and setting the fractured bones. But be this as it may, the adjuster sent out by defendant with power to ascertain the extent of and settle the claim was certainly possessed of au-

Digitized by Google

thority to commit defendant to the payment for the treatment which he ordered plaintiff to have the doctor continue, even though such extended beyond the realm of imperative surgical relief at the time of the accident. It was the duty of defendant's adjuster to not only ascertain, but to settle the loss, and to this end authority is involved to minimize the extent of the loss as well. Some discretion essentially inheres in matters of this character, and if it appears it was exercised by the adjuster, as here, for the purpose of minimizing the loss which was within the purview of defendant's undertaking in the policy to compensate in the end, the authority of the adjuster with respect of that matter ought not to be doubted.

But it is said, though such be true, plaintiff is not entitled to recover here, for the reason he paid the surgeon's bill without the written consent of the company and without requiring it to be ascertained after a trial of the issue. The policy provision seems to require this, and it is true that, though plaintiff paid the surgeon's bill of $125, he did so without a trial of the issue first had and without the written consent of the company. Touching this matter, it will be essential to set forth and examine the character of the insurance and the language of the contract evinced by the policy. By the policy defendant company undertakes to INDEMNIFY the insured against the losses and expenses therein contemplated. Throughout, the policy appears to be one of indemnity to the insured against such damages as may be ascertained as therein required and compensated by him. Moreover, under the express provisions of the policy it is not enough that the loss or expense shall be merely paid by the insured but in express terms the policy requires such loss or expense to be ascertained against the insured "after trial of the issue." So much of the sixth provision of the policy as is relevant here is as follows:

Digitized by Google

"6. No action shall lie against the company as respects any loss or expense under this policy unless it shall be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him after trial of the issue, or unless payments shall have been made with the written consent of the company."

It is, of course, important for an insurance company, with policies outstanding throughout the country, including and covering a broad field of liability, to require that such claims as it undertakes to pay shall be ascertained in some impartial manner, and it would seem to be entirely reasonable and just that *carte blanche* authority should be withheld from its patrons to obligate it by merely paying out money on claims presented. Obviously this is the spirit and intent of this provision of the policy, and it is clear that it imposes, as a condition precedent to its liability to respond, that the insured shall not only first pay the claim before he can recover from it, but must defer the payment until after trial of the issue touching the subject-matter, unless written consent of the company to such payment be first obtained. Until such prerequisite conditions of the policy are first complied with, the right of the insured to recover indemnity does not attach. [See Allen v. Aetna Life Ins. Co., 145 Fed. 881; Connolly v. Bolster, 187 Mass. 266.]

But though such be true, the provision of the policy above quoted is inserted for the benefit of defendant and, like other provisions of that character, may be waived by it. The court found the issue for plaintiff and it is our duty to sustain the judgment on any theory which may sufficiently appear in the evidence to support it, for the matter is in no wise embarrassed by instructions. There is substantial evidence tending to prove that defendant waived the condition of the policy postponing its liability to plaintiff until after a trial of the issue and treated that stipulation as one

Digitized by Google

independent of the subject-matter here involved. We say this because it appears that its adjuster, who immediately came upon the scene to investigate and settle the matter, went about the performance of his duty through undertaking to minimize the loss which might eventually be chargeable to the company. In pursuing this course, he instructed plaintiff to continue the services of the doctor and thereafter, when the surgeon's services were completed and the bill rendered, defendant mailed plaintiff a check for $40 as if it was liable therefor, even though no trial of the issue against him was had. This conduct on the part of defendant indicated an intention to waive the provision of the policy requiring a trial of the issue as a condition precedent to its liability and to recognize liability under the policy wholly aside from, or, as said in Kelly v. Maryland Casualty Company, 89 Minn. 337, independent of that provision entirely.

There is no suggestion in the case that defendant sought to compromise the claim with plaintiff, but rather it appears that it recognized a liability under the policy, even though no trial of the issue was had, and arbitrarily fixed the amount at $40 and sent a check to him therefor, which, as above stated, was returned.

In this view—that is, of a waiver—the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

ALFRED G. HAY, Respondent, v. AMERICAN FIRE CLAY COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **EVIDENCE: Primary Evidence: Carbon Copy.** A carbon copy of a document made by the same imprint as the typewritten original is regarded as an original and may be introduced in evidence although the typewritten original is not accounted for.

2. **———: Unsigned Written Instrument: Admissibility.** A document setting out the terms of a contract, but not signed, is not admissible in evidence as a written contract.

3. **———: Memorandum: Admissibility.** A written memorandum relating to a transaction, made by one party without the knowledge of the other, is not admissible in evidence, unless it was made contemporaneously with the transaction, and even then it can be used only for the purpose of refreshing the memory of the witness making it and as auxiliary to his testimony.

4. **CORPORATIONS: Powers of Officers: Admissions.** The president and secretary of a corporation can make admissions against it.

5. **EVIDENCE: Admissions: Corporations.** In an action against a corporation for breach of a contract of employment, a written memorandum setting forth the terms of the agreement, made by the secretary of the corporation at the request of the president and approved by him, was admissible in evidence as an admission by the corporation, although the president testified that he had never seen or approved it; such denial going to the weight of the evidence and not to its admissibility.

6. **———: ———: Time of Admission.** An admission by the adverse party is competent evidence notwithstanding it was not made contemporaneously with the agreement constituting the subject-matter of the suit.

7. **TRIAL PRACTICE: Credibility of Witnesses: Question for Jury.** The weight and value of the testimony and the credibility of the witnesses giving it are questions for the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

Digitized by Google

AFFIRMED.

Watts, Gentry & Lee for appellant.

The court erred in admitting over defendant's objection, Exhibit A, offered by plaintiff which was a carbon copy of a memorandum drawn up by the witness Crawford several days after the making of the alleged oral agreement between plaintiff and defendant on July 8, 1911. The admission of this memorandum was error because: First: It was not the contract sued upon and was in fact no contract at all for it was signed by nobody. Second: It was not admissible as an original memorandum because it was not made at the time of the transaction between the parties, on July 8, 1911, and even if it had been an original memorandum it would not have been admissible for the purpose of refreshing the recollection of the witness, Crawford, for his recollection needed no refreshing. Wells v. Hobson, 91 Mo. App. 379; Railroad v. O'Brien, 119 U. S. 99; National Ulster Co. Bank v. Madder, 114 N. Y. 280, 11 Am. St. 633; State v. Menard, 110 La. 1098; McKelvey on Ev., Sec. 233, p. 323; Russell v. Railroad, 17 N. Y. 140; Brown v. Jones, 46 Barb. 400; Meacham v. Pell, 51 Barb. 65. Third: It did not prove, nor tend to prove, the terms of the oral agreement for the statements contained in it were statements made by the witness Crawford, as he dictated it in the absence of both parties to the contract; therefore those statements were merely hearsay. Barrie v. United Rys. Co., 125 Mo. App. 96. Fourth: If the original of said memorandum had been admissible, this carbon copy (Exhibit A, is shown by the witness Crawford to have been a carbon copy of the original) was not admissible because the absence of the original was not accounted for and defendant was not shown to have possession of it, nor had any notice ever been served upon defendant to produce it, and no effort to

Digitized by Google

find the original was shown. Brunnemer v. Cook & Co., 85 N. Y. Supp. 956; Blondeau v. Sheridan, 81 Mo. 545; Ebersole v. Rankin, 102 Mo. 488; McCooney v. Wallace, 22 Mo. 377; Lohnes v. Baker, 156 Mo. App. 397; Henderich v. Railway Co., 159 Mo. App. 190; Myers v. Brice, 12 Weekly Notes of Cases, 87; Gurley v. McLennon, 17 App. Cases, 170. Fifth: Counsel for plaintiff stated in offering Exhibit A that he offered it as an admission and, further, that he offered it as evidence tending to prove the oral contract. It was not competent for the purpose of showing an admission, for Dr. Cale, president of the defendant company, was not shown to have ever agreed that it contained the terms of the alleged oral agreement. The mere fact that it was shown to him by Crawford, if it was so shown to him, and no evidence was offered to show that he denied its correctness does not tend to prove an admission by him. Exposition Co. v. Emerson, 149 Mo. App. 594; Senn v. Ry. Co., 108 Mo. 142.

John A. Blevins and *J. W. Jamison* filed argument for respondent.

STATEMENT.—This is a suit on a contract of employment alleged to have been entered into between plaintiff and defendant corporation for the rendering of services by plaintiff to defendant. The finding and judgment were for plaintiff and defendant prosecutes the appeal.

Appellant's counsel has stated in the brief fully and fairly the relevant facts appearing in the record, and this we adopt as a sufficient statement concerning the matter in judgment. The statement referred to is as follows:

"The petition alleges the incorporation of the defendant and charges that it owned a tract of land in St. Louis county, Missouri, containing valuable deposits of fire clay; that on or about the 8th of July, 1911, the parties entered into an agreement by which

Digitized by Google

plaintiff agreed to render services thereafter, from time to time as might be required of him, in the work of mining the said clay deposit and marketing the same, and that defendant agreed to pay him for such services a salary of $300 per month; that the plaintiff, at the request of defendant, entered upon negotiations for the purchase of suitable machinery to be used in said work and performed other services as was required of him, but that defendant neglected and failed to enter upon the actual work of developing said property and to furnish suitable machinery therefor, and failed to furnish plaintiff employment with respect to said work which he contracted to do. It is further alleged that plaintiff at all times held himself in readiness to carry out his contract and has waited in expectation of being called by defendant at any time to render services under his contract. The petition closes with a prayer for judgment for $1200.

"On the part of the plaintiff two witnesses were called, Mr. S. K. Crawford and the plaintiff himself. The testimony given by these two witnesses tended to establish the following facts:

"Dr. Geo. W. Cale, Jr., was the president and principal stockholder of the defendant company and managed and controlled its affairs. Mr. Crawford was secretary and one of the directors of said company, defendant having had one share of stock put in his name so as to entitle him to serve on the board of directors. Crawford was then chief clerk in the medical department of the Frisco Hospital, while Dr. Cale was chief surgeon there, and they were very intimately associated in their respective positions.

"In June, 1911, Dr. Cale suggested to Mr. Crawford to see if he could do something about disposing of the property owned by defendant in St. Louis county north of the city of St. Louis. Crawford told him that he knew Mr. Hay, the plaintiff, and that he was an experienced clay mining man. Dr. Cale sug-

Digitized by Google

gested that Crawford see Hay, which he did. After a preliminary talk or two with Hay, Crawford reported back to Dr. Cale and Dr. Cale suggested bringing him out to the hospital to luncheon on Saturday, July 8, 1911, which was done. After having luncheon at the hospital, Dr. Cale, Crawford, plaintiff and a young man named Chapman—who in the meantime had succeeded Crawford as chief clerk at the hospital—got into Dr. Cale's automobile and went out into St. Louis county, and went over defendant's property. Various plans were discussed as to the best way to develop the property, the best road to be used in hauling clay to the railroad, the feasibility of unloading a steam shovel and transporting it over a bridge on one of the county highways to defendant's property, and other details. The party then returned to the hospital and, according to plaintiff's evidence, Dr. Cale, Crawford and plaintiff went into Dr. Cale's private library and an agreement was there discussed and entered into orally, by which it was agreed that the company should borrow $3500 to be used in developing the property, with a view of selling it, and that Mr. Hay, the plaintiff, should render such services as were necessary in procuring the necessary machinery, superintending and directing the work, and get the property in such shape as to be able to sell it, and, in the meantime, handle and sell the clay that might be taken from the premises. For these services he was to be paid at the rate of $300 per month, and he was to use his office in the Commonwealth Trust Building as the office of the company and the office rent was to be divided between the company and Mr. Hay and the company was to furnish a telephone and stenographer and to pay plaintiff his necessary expenses incurred in furthering the objects of the contract. In the event of a sale he was to be paid a commission, depending upon the amount for which the property was sold. Dr. Cale then told Mr. Hay that it would not be necessary for him, Hay,

Digitized by Google

to see him further, but that Mr. Crawford would represent him and give him (Hay) instructions as to what Dr. Cale wanted done.

"Crawford saw Hay as often as three or four times a week and communicated with him almost daily and they made efforts to borrow the necessary $3500 and Hay entered into negotiations with various parties preparatory to securing necessary machinery and workmen, teams, etc., for developing the property. After numerous efforts to raise the money, Hay at last secured the promise of one Gibson to make the loan, but when the necessary papers were prepared and sent to Dr. Cale to be executed in behalf of the company, Dr. Cale declined to execute them and the project fell through.

"In the meantime the relations between Crawford and Dr. Cale had become strained and shortly after the failure to execute the papers for the loan, Crawford resigned as secretary. Crawford shortly thereafter brought suit against the company for his own services, as lawyer, and also sued Dr. Cale individually for legal services. Gibson sued the company for commissions for the loan and Hay sued the company for $1200 for four months salary at the rate of $300 per month.

"Plaintiff offered in evidence a typewritten document, marked Exhibit A, which purported to contain the agreement of the parties but was not signed by either of them. On this subject Crawford testified that, during the conversation on July 8th, in Dr. Cale's library, he, Crawford, made a pencil memorandum of the agreement and several days thereafter dictated it and had it writen up on a typewriter and that he showed the original of that typewritten document, or a carbon copy thereof, to Dr. Cale. However Crawford was uncertain whether the paper which was produced at the trial as Exhibit A, and offered in evidence, was the identical paper which he showed to Dr. Cale, or whether the one he showed him was the original in-

Digitized by Google

stead of the carbon copy—the one offered in evidence was a carbon copy. He, Crawford, did not know where the original was. This paper went in over the objections and exceptions of the defendant and the defendant subsequently moved to strike out the testimony relating thereto and to withdraw the paper from the consideration of the jury, all of which the court declined to do and the defendant preserved its exceptions.

"On the part of defendant, the evidence of Dr. Cale, president of the defendant company, and his private secretary, Mr. Chapman, was to the effect that no agreement of any kind was ever entered into with Hay. They admitted the invitation to Hay to take lunch at the hospital; that he did take lunch there and the party, composed as Hay and Crawford had described it, went to the property of the American Fire Clay Company, in St. Louis county, on July 8, 1911, and went over the ground and discussed how the proposition ought to be handled, discussed the roads, the bridge and the steam shovel, but made no definite arrangement and no agreement of any sort with Hay, and nothing whatever was said about employing Hay on any salary.

"When the party returned to the hospital Hay and Crawford did not enter the hospital at all, but started down town while Dr. Cale and Chapman went into the hospital.

"The defendant's evidence further tended to show that the subject of a $300 salary, or any other salary, was never discussed between Dr. Cale and Hay and that Dr. Cale never authorized Crawford to make any sort of agreement with Hay, nor did Dr. Cale refer him to Crawford nor tell Crawford to give Hay directions of any kind. Dr. Cale also denied that Crawford brought him papers to execute in order to procure a loan and denied refusing to sign them.

"The evidence offered by defendant further tended to show that about the middle of August, 1911,

Digitized by Google

Dr. Cale, who was then away on his vacation, wrote a letter to Chapman directing him to tell Crawford that he had abandoned the idea of procuring a loan on the property. Shortly after the receipt of that letter Chapman called up Crawford and communicated that message to him. A day or two later, Hay called up the hospital and asked Chapman what he had heard from Dr. Cale and Chapman then informed him, over the telephone, that Dr. Cale said he had decided to abandon the idea of raising funds to handle the property, and, a day or two later, Chapman met Hay on the street and Hay asked him if he had heard anything further from Dr. Cale, to which Chapman replied in the negative, whereupon Hay said 'All right,' and no further conversation was had.

"Dr. Cale testified that he never saw plaintiff's Exhibit A nor a copy of it, until it was offered at the trial, and that Crawford, did not, on the 8th of July, 1911, during any conference make a pencil memorandum of any agreement nor exhibit such a memorandum to Dr. Cale, nor in his presence."

The case was submitted to the jury under proper instructions and a verdict was given for plaintiff for the full amount sued for—that is, $1200. No complaint whatever is made with respect to the instructions given or refused, nor of the conduct of the trial nor of the verdict, nor pertaining to the sufficiency of the evidence, save that the court erred in receiving in evidence the unsigned writing above referred to.

NORTONI, J. (after stating the facts).—It appears the unsigned writing introduced in evidence was typewritten and that used on the trial was a carbon copy. The witness Crawford testified that what is known both as an original and a carbon copy were made at the same time, and the carbon copy was furnished to plaintiff by him. Plaintiff approved it as setting forth the terms of the agreement, and it seems

Digitized by Google

retained this carbon copy. The original, made at the same time as the carbon copy, was neither produced nor called for, and the witness did not know its whereabouts. Because of this alone, it is urged the court erred in receiving the carbon copy in evidence, but we are not so persuaded. Such carbon copies are made by the same imprint as the original and there is essentially indited thereon the identical matter. Such being true, if the original copy accurately reveals the statements therein, the carbon copy does likewise. Therefore, carbon copies so made are regarded rather as originals and, as such, primary evidence under the rule of evidence here invoked, for they essentially partake of this quality in the process of inditing their contents. It is clear the writing was not objectionable as secondary evidence because it was a copy. [See Wright v. Chicago, B. & Q. R. Co., 118 Mo. App. 392, 94 S. W. 555; Bond v. Sandford, 134 Mo. App. 477, 114 S. W. 570.]

But though such be true, it is argued the writing was inadmissible as evidence because it was not signed, and, moreover, because it was not made contemporaneously with the agreement. However, it was not introduced as the contract between the parties, in the usual sense of that term, but rather as an admission on the part of defendant. There can be no doubt that it was inadmissible as a written contract, for it was not signed by either defendant or plaintiff. But the testimony is, that it was drawn up by Crawford, the secretary of defendant company, at the direction of Dr. Cale, its president, and in accord with the pencil memorandum made by Crawford, the secretary, at the time the oral agreement was entered into between plaintiff and defendant and under their joint supervision. It is true the pencil memorandum was not produced, and Crawford, the secretary of defendant company at the time this paper was reduced to typewriting, testifies that the typewriting was actually done some three or four

Digitized by Google

days after the agreement between the parties was entered into. Because of this it is urged the writing was inadmissible, for that it was not indited contemporaneously with the oral agreement. If the writing revealed a memorandum made by one party as if *ex parte*, without the knowledge of the other, the argument would prevail, in view of the further fact that the witness testified concerning the agreement in full without need of the writing to refresh his memory.

The cases relied upon by defendant go to the affect—first, that for a writing to be competent in evidence when made by one party concerning a transaction without the knowledge of the other, as by setting it down in a book, it must appear to have been contemporaneously made. Such is the rule of Wells v. Hobson, 91 Mo. App. 379. Second, that a writing made without the knowledge of the adverse party, and, therefore, *ex parte*, contemporaneously with the transaction in suit is not competent to be received in evidence for the purpose of consulting and considering its contents, except it be used to refresh the memory of the witness and as auxiliary to his testimony. Therefore, when it appears the witness distinctly remembers the transaction and can speak without the aid of such writing, the writing should not be received. Such are the cases of Vicksburg, etc. R. Co. v. O'Brien, 119 U. S. 99; Nat. Ulster County Bank v. Madden, 114 N. Y. 280; Meacham v. Pell, 51 Barb. (N. Y.) 65; McKelvey on Evidence, Sec. 233.

The principle thus invoked seems to relate to such memorandums and writings as are made by one party without the knowledge of, and separate and apart from, the other. This being true, it is unavailing here, for in the instant case the writing was made, according to the evidence of Crawford, the secretary of the company, by him on behalf of defendant and at the instance and direction of Dr. Cale, its president. Much of the argument proceeds, we believe, on the con-

Digitized by Google

ception that Dr. Cale is the real defendant and that Crawford, who wrote the memorandum and testified to it, is an utter stranger to the transaction. Something is said in the brief to the effect that Crawford is not a party to the suit and, therefore, it was not within his province to make an admission. It is true that Crawford is not a party to the suit and it is true, too, that this suit does not proceed against Dr. Cale, but rather against the defendant corporation of which he is president and of which Crawford was a director and the secretary at the time the writing was made. Obviously these two together could make an admission against the defendant corporation, of which they were officers. Crawford says he wrote the paper at the direction of Dr. Cale, with a view of embodying the terms of the contract between plaintiff and defendant, from the pencil memorandum he made at the time of the verbal agreement, and submitted it within three or four days to both plaintiff and Dr. Cale, the president of defendant company. His evidence, too, is that when the writing was submitted to Dr. Cale, he tacitly approved it by suggesting that Crawford should put it in the form of a letter and transmit it to plaintiff for his signature. This, it seems, was not immediately done, and plaintiff continued to retain the copy furnished to him by Crawford, awaiting the signature of defendant through its president, Dr. Cale. In the meantime, Dr. Cale went away on his vacation and wrote a letter to Chapman, his private secretary, instructing him to notify plaintiff that he had abandoned the whole project. Though it be this writing was actually put on paper three or four days after the agreement, it was competent in evidence as an admission against defendant corporation, tending to prove the arrangement between the parties if Dr. Cale saw and approved it as stating the terms of the agreement. Obviously an admission of the adverse party is com-

Digitized by Google

petent to be received in evidence without regard to the fact that it was not made contemporaneously with the agreement constituting the subject-matter of the suit. [See Wigmore on Evidence, Sec. 1048, *et seq.*]

The mere fact that Dr. Cale denied he directed Crawford to reduce the alleged contract to writing and denied, too, that it was ever submitted to him for approval and that he ever approved it is not sufficient to render the paper incompetent in evidence as an admission against defendant company, for the evidence of Crawford is directly to the contrary—that is, that he, the secretary of the company, acting under the directions of the president drew up this paper and submitted it to the president who approved of its contents, but with the suggestion only that it might be better to put it in the form of a letter to plaintiff for him to accept. Of course, the weight and the value of the testimony together with the credibility of the witnesses was a question for the jury.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, concurs. *Allen, J.*, not sitting.

MARY E. CURTIS, Appellant, v. STIX, BAER & FULLER DRY GOODS COMPANY. Respondent.

St. Louis Court of Appeals, December 31, 1913.

1. **NONSUITS: Depositions: Right to Require Witness to Sign: Effect of Dismissal of Cause.** After the dismissal of a case, the court has no power to enforce an order on a witness whose deposition had been taken, to show cause why he should not be required to sign the same.

2. **DEPOSITIONS: Right to Take: Statute: "Conditionally."** The word "conditionally" in Sec. 6384, R. S. 1909, providing that any party to a suit pending in any court in the State may obtain the deposition of any witness, to be used in such suit

Digitized by Google

conditionally, relates to the use of depositions, and not to the right to take them.

3. ———: ———: **Time of Taking.** Under Sec. 6384, R. S. 1909, and the other statutes relating to the taking of depositions, depositions may be taken after a suit is instituted and before the issues are made up.

4. ———: **Costs.** The cost of taking depositions, as authorized by Sec. 6384, R. S. 1909, and cognate statutes, may be taxed against the losing party.

5. **APPELLATE PRACTICE: Conclusiveness of Finding.** A finding by the trial court on conflicting evidence is conclusive, on appeal.

6. **DEPOSITIONS: Costs: Transcription: Statute.** Under Sec. 6403, R. S. 1909, providing that the examination of a witness whose deposition is taken shall be reduced to writing or taken in shorthand and transcribed in writing in the presence of the person or officer before whom it is taken, the cost of reducing a deposition to writing or of transcribing the shorthand notes may be taxed as costs in the suit.

7. **STATUTES: Construction.** That which is within the true intent and spirit of a statute is as much a part of it as its letter.

8. **DEPOSITIONS: Costs: Transcription: Agreement of Counsel.** Where plaintiff's counsel, in accepting service of a notice to take depositions, stipulated that they might be taken in shorthand and transcribed, it was proper (even aside from Sec. 6403, R. S. 1909, authorizing such taxation) to tax the cost of transcribing the shorthand notes against plaintiff, who subsequently dismissed the suit.

9. ———: ———: **Estoppel.** Where, in pursuance of a conspiracy between plaintiff and witnesses whose depositions were taken by defendant, the witnesses refused to sign their depositions, whereupon the court made an order to show cause why they should not sign them, but, before the return day thereof, plaintiff dismissed the suit, depriving the court of power to proceed under the order, the fact that the depositions were not signed and filed did not prevent the taxation of the costs thereof against plaintiff; he being estopped by his actions from complaining on that score.

10. ———: ———: **Estoppel.** Where, in pursuance of a conspiracy between plaintiff and witnesses whose depositions were taken by defendant, plaintiff evaded service of a subpoena to give her deposition, the entire costs of the depositions of such witnesses were taxable against plaintiff, upon her

Digitized by Google

subsequent dismissal of the suit, although a part of the examination of the witnesses was devoted to the ascertainment of plaintiff's whereabouts.

11. ———: **Right to Take Deposition of Adverse Party.** The mere fact that a defendant desires the deposition of the plaintiff to aid in preparing his defense is not enough to defeat the right to take it, under Secs. 6356 and 6361, R. S. 1909, provided it appears that it is taken in good faith for a legitimate use—that is, for actual use at the trial.

12. **ESTOPPEL: Taking Advantage of Own Wrong.** A party may not avail himself of the benefits ensuing from his own wrong.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench,* Judge.

AFFIRMED.

Chas. J. Macauley and *Harry H. Haeussler* for appellant.

(1) At common law no costs were allowed. The right thereto can exist only when provided by statute. And it is a well-established rule of law that such statutes are to be strictly construed against the party claiming under them. Shed v. Railroad, 67 Mo. 687; In Re Green, 40 Mo. App. 491; Baldwin v. Bulware, 82 Mo. App. 324; Jackson County v. Stone, 168 Mo. 577; Watkins v. McDonald, 70 Mo. App. 357; Conroy v. Frost, 38 Mo. App. 351. (2) The fees of a stenographer for taking down and transcribing evidence given at the taking of depositions are not legally chargeable as costs in a case. Schawacker v. McLaughlin, 139 Mo. 333; Manning v. Roberts, 83 Mo. App. 627. (3) The respondent did not take the depositions referred to in its motion to tax as cost the expense of taking depositions for the purpose of using them as evidence in the trial of the case, but, as stated in their said motion and by counsel for defendant, for the purpose of preparing its defense to the said suit, and for the further purpose of ascertaining the where-

Digitized by Google

abouts of plaintiff. The expense of taking them was not properly taxable as costs in the case, and the court erred in sustaining defendant's said motion, and in overruling plaintiff's motion for rehearing and new trial. (4) The only legitimate purpose for which the deposition of a party to a suit may be taken is that it may be used at the trial of the case. Tyson v. Savings & Loan Ass'n., 156 Mo. 588. (5) The depositions in the case at bar were never signed by the witnesses, never filed in the case, and never used as evidence in the trial of the case. Therefore the court erred in taxing the cost of taking them as costs in the case. (6) There never was any agreement between the parties to this suit that the depositions might be taken in shorthand and then transcribed. And there was no agreement that the expense of taking the depositions, or the expense of transcribing the testimony might be taxed as costs in the case. The court therefore erred in sustaining said motion. State ex rel. v. Gans, 72 Mo. App. 638; Watkins v. McDonald, 70 Mo. App. 357.

Eliot, Chaplin, Blayney & Bedal for respondent.

(1) Any party to a suit pending in any court in this State may obtain the deposition of any witness, to be used in such suit, conditionally. R. S. 1909, sec. 6384. (2) The testimony of a witness may be taken in shorthand and transcribed (R. S. 1909, sec. 6403), and when so taken the reasonable cost of the taking of the shorthand notes and transcribing of them may be taxed. (3) Any party to a civil action may compel any adverse party to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses (R. S. 1909, sec. 6356) and if he refuses to testify either in court or before any person authorized to take his deposition his petition, etc., may be rejected. R. S. 1909, sec. 6361. (4) Upon the

Digitized by Google

plaintiff dismissing his suit, the defendant shall recover against the plaintiff his costs. R. S. 1909, sec. 2275. Where a cause is dismissed for want of jurisdiction the court still has authority to render judgment against plaintiff for costs. Ensworth v. Curd, 68 Mo. 282; State v. Thompson, 81 Mo. 163. (5) Even before the amendment of 1907 of Sec. 6403, R. S. 1909, permitting depositions to be taken in shorthand and transcribed it was the law that when by agreement a stenographer was employed his fee could be taxed as costs. Watkins v. McDonald, 70 Mo. App. 357; State ex rel. v. Gans, 72 Mo. App. 638. (6) A party who is brought into court to answer the claim of another may not be compelled to take all risks of losing the testimony in his behalf before it may be made available in the trial, but may provide against the uncertainties of life, health and permanency of residence by obtaining the depositions of his witnesses while it is certainly within his reach, and such depositions are taxable though not used. Ex parte Livingston, 12 Mo. App. 80; State ex rel. v. Gans, 72 Mo. App. 638. (7) After a party to a cause, who knows that witnesses whose depositions have been taken are refusing to read and sign same, and an order has been made on them to show cause why they should not sign them, and who knows that the depositions cannot be filed until signed, by his voluntary act of dismissing the case prevents the further operation of the order to show cause, such party will not be heard to say that the depositions were not signed nor filed and hence cannot be taxed as costs.

NORTONI, J.—Plaintiff appeals from a judgment of the court taxing the costs of certain depositions against her. It appears she instituted her suit against, and the depositions were taken by, defendant therein. The depositions were neither signed by the witnesses nor filed with the clerk at the time plaintiff dismissed her suit, and the principal question for con-

Digitized by Google

sideration relates to the action of the court in adjudging the costs therefor against plaintiff. In giving judgment for defendant, touching this question, it is obvious the court proceeded in the view that the depositions were not signed and filed because of the wrong of plaintiff, in that she had conspired and co-operated with the witnesses to prevent such signing and filing, and finally dismissed her suit to accomplish that end.

Plaintiff instituted her suit on May 12, seeking damages for an alleged false arrest. In her petition, it is averred that she had been taken into custody by the agent of defendant corporation on the sidewalk in front of defendant's store and detained in its office for a period of three hours and then taken by defendant's agent to the home of one of her daughters and then taken to the home of another daughter and finally released.

On May 17, defendant served Mr. Macauley, plaintiff's counsel, with a notice to take depositions on May 22. Plaintiff's counsel accepted service of the notice to take depositions by an indorsement thereon which recited, too, that the depositions were to be taken in shorthand and transcribed. Though it appears the notary issued subpoenas addressed to plaintiff and her two daughters, Mrs. Philip Smith and Mrs. William McGary, and her two sons-in-law, Mr. Smith and Mr. McGary, to appear and testify on the twenty-second, these were not served immediately, for the reason the witnesses could not be found. On the hearing of the motion to tax the costs of the depositions against plaintiff, it was shown in evidence that plaintiff's daughters, Mrs. Smith and Mrs. McGary, purposely evaded service of the subpoenas, and to this end both of them left their homes in the city and spent one night at the Terminal Hotel in St. Louis. It appears that plaintiff's counsel informed her that the depositions were to be taken in the case, but did not suggest that the parties evade service of the subpoe-

Digitized by Google

nas. Before the subpoena was served on plaintiff, she departed from St. Louis and her son-in-law and daughter, Mrs. McGary, accompanied her to the station, where she boarded a train for Chicago. Mrs. Smith and Mrs. McGary, daughters of plaintiff, and their husbands were finally served with subpoenas and testified before the notary, Mooney, who took the evidence in shorthand and afterwards transcribed it. The evidence of these witnesses is addressed to the allegations of plaintiff's petition in part, and some of the examination of each of them pertains to the whereabouts of plaintiff for whom a subpoena had been issued as well. Defendant sought to take the deposition of plaintiff, but, as before said, she had departed from the city immediately after the notice to take depositions was given, and the evidence affords a strong inference that it was about the same time her two daughters were spending the night at the Terminal Hotel under assumed names. The witnesses all disclaim in their depositions knowledge of the whereabouts of plaintiff, and the daughter, Mrs. McGary, said she did not know nor care where her mother was, nor how long she would be away. Mrs. Smith, the other daughter, disclaimed knowledge of the whereabouts of her mother, although she admitted she had received a letter from her, but said she did not know where it was written or posted or postmarked and said that she had destroyed the letter.

There is evidence tending to prove these depositions were taken in good faith on the part of defendant, for the purpose of using them in the case, and there is evidence, too, on the part of plaintiff tending to prove the contrary. However this may be, the court found the issue for defendant on the evidence, and taxed the costs of the depositions against plaintiff as though they were taken in good faith and to be used in the case. This being true, we will treat the matter of defendant's good faith as concluded here by the finding of

Digitized by Google

the trial court on the facts before it. In view of the fact that plaintiff had left the city after the subpoena for her was issued, and in view of the other facts developed in the depositions of her daughters and members of her family that they had concealed themselves about the same time to prevent the service of subpoenas, defendant filed a motion in court to be relieved from pleading to plaintiff's petition until plaintiff disclosed her whereabouts and submitted to the taking of her deposition in the case. This motion plaintiff's counsel resisted as frivolous and moved the court to strike it from the files.

During the interim and by June 9, Mr. Mooney, the notary, had transcribed the depositions from his shorthand notes. One of the witnesses, Mrs. McGary, had been excused by the notary to a day certain to appear and sign her deposition, but failed to obey the order of the notary to that effect. Thereupon the notary mailed letters to the several witnesses to come to his office to sign the depositions, but none of them heeded the request. Thereafter, he addressed the witnesses again to the same effect by registered mail and requested them to appear and sign the depositions and this request was ignored. Then the notary telephoned Mrs. Smith and Mrs. McGary and Mr. Smith and they refused to accede to his request. Thereafter, the notary called at Mrs. McGary's home with a view of presenting her deposition for signature, but he was refused admittance thereto. Upon these facts being reported by the notary to defendant's counsel, a motion was filed on behalf of defendant for an order of the court upon the several witnesses to appear and show cause why they should not sign their depositions theretofore given and taken in shorthand. The motion of defendant to be excused from pleading until plaintiff submitted to the taking of her deposition and its motion for an order on the witnesses to show cause why they would not appear and sign their depositions

Digitized by Google

were considered together by the court and on this hearing the facts were fully stated before it. The court, after being fully advised in the premises, made an order on the witnesses to show cause and this order was placed for service in the hands of the sheriff. Thereafter, on the same day, the court indicated, without entering an order to that effect, that it would sustain defendant's motion to be relieved from pleading to the petition until plaintiff disclosed her whereabouts so that defendant might take her deposition. Upon the court thus signifying its intention in that behalf, though before an order to that effect was made, plaintiff voluntarily dismissed her case. Of course, when the case was dismissed the power of the court to enforce the order on the witnesses to show cause why the depositions should not be signed, preparatory to filing, abated and the depositions were neither signed nor filed. Thereupon defendant moved the court to tax the cost of the depositions against plaintiff, and on this motion the facts above stated were fully developed in evidence taken and made to appear. After being fully advised in the matter and on a hearing of the evidence, detailing the course of conduct pursued throughout, the court gave judgment in favor of defendant and against plaintiff, to the effect that the usual costs entailed in the matter of taking the depositions, including that of the notary for transcribing them, be taxed against plaintiff. It is from this judgment of the court the appeal is prosecuted by plaintiff.

The statute (Sec. 6384, R. S. 1909) provides that any party to a suit pending in any court in this State may obtain the deposition of any witness, to be used in such suit, conditionally. It has been heretofore determined that the word "conditionally," thus employed in the statute, relates to the use of the depositions and not to the right to take them. Under this section and the other statutes relating to the taking of depositions, it is said the depositions of witnesses may

Digitized by Google

be had after suit is instituted and before the issues are made up, for it is the right of a party to provide against the uncertainties of life and the health of the witnesses or the permanency of their residence by obtaining the evidence while it is certainly within his reach. [Ex Parte Livingston, 12 Mo. App. 80.] Moreover, the proper costs of taking such depositions may be taxed by the court against the losing party in the suit. [See State ex rel. Ury v. Gans, 72 Mo. App. 638.] But though such be true, it is argued plaintiff should not be charged with the costs of taking the depositions, for it is said they were not taken in good faith with a view of using them in the trial of the case but rather to merely enable defendant to prepare its defense. It is true there is evidence tending to sustain this view but there is substantial evidence *contra* thereto as well, and the witnesses appear to have been examined with respect to the facts set forth in plaintiff's petition. It is entirely clear that had any of these witnesses died, or, after the taking of their depositions, removed from the jurisdiction of the court, or were not available at the trial, the depositions so taken would have been competent in evidence. By giving judgment for defendant on the evidence before it, the court manifestly found the depositions were taken in good faith on its part with a view of using them on the trial, and this matter of fact may not be reviewed here.

But it is argued, though such be true, the court erred in adjudging the costs of transcribing the depositions from the shorthand notes against plaintiff, and cases are cited which would sustain this argument if the statute continued as of old and no agreement on the part of plaintiff with respect to that matter appeared. Formerly the statute authorized no more than that the examination of the witnesses should be reduced to writing, but this was amended in 1907, as will appear by Laws of 1907, p. 253. The present

Digitized by Google

statute—that is, as amended—is section 6403, Revised Statutes, 1909. This statute concerning depositions provides that the witness shall be sworn or affirmed to testify the whole truth, and his examination shall be reduced to writing, or taken in shorthand and transcribed, in writing, in the presence of the person or officer before whom the same shall be taken. It appears here that the notary who took the depositions was also a stenographer. He took them in shorthand and transcribed them thereafter as the statute expressly authorized him to do.

Obviously this statute authorizes the cost for transcribing depositions from shorthand notes as clearly as it authorizes the cost for reducing them to writing in longhand. Under the old law there was no question of the right to tax as costs the expense of writing the depositions in longhand. Though it be that the statute does not in express terms say that the costs of reducing the depositions to writing or of transcribing the shorthand notes may be taxed as costs in the case, such is obviously within its intendment. That which is within the true intent and spirit of a statute is as much a part of it as its letter. The Supreme Court so ruled the question of taxing the costs of a referee under a statute equally indefinite through declaring its intendment, as will appear by reference to the case of Schawacker v. McLaughlin, 139 Mo. 333, 342, 343, 40 S. W. 935.

Moreover, plaintiff's counsel, in accepting service of the notice to take depositions, affixed his signature to a stipulation thereon to the effect that "These depositions may be taken in shorthand and transcribed." The indorsement on the notice, together with the signature of plaintiff's counsel and the date is as follows: "Service of the above notice is hereby acknowledged, and issue of *dedimus*, and all exceptions as to time waived. These depositions may be taken in shorthand and transcribed. May 17, 1911.

Digitized by Google

Charles J. Macauley, Attorney for plaintiff." It is true counsel testified on the hearing that he signed this only through courtesy and without any intention to agree that the depositions should be transcribed. But this avails naught against the express stipulation under which the depositions were taken and into which he entered touching the matter, for it will not do to say lawyers do not know what they are about in such matters. Such agreement appearing as it does, it is proper for the court to tax the costs of transcribing the notes against the losing party, even aside from the statute above quoted. The point has been expressly decided. [See Watkins v. McDonald, 70 Mo. App. 357; State ex rel. Ury v. Gans, 72 Mo. App. 638.]

But it is argued, though such be true, the court erred in taxing the costs of the depositions against plaintiff because they were not filed in the case. From the evidence introduced on the hearing, it abundantly appears that the depositions were not filed because the witnesses refused to sign them. The notary made several efforts, as above detailed, to the end of obtaining their signatures, and finally defendant was compelled to move the court for an order on the witnesses to show cause why they did not sign the depositions they had given. Upon this motion being sustained and a copy of the order placed in the hands of the sheriff, plaintiff dismissed her cause and thus defeated defendant in its purpose to obtain the filing of the depositions. It is defendant's theory, and the evidence amply supports it, that the plaintiff and the witnesses, who had given depositions, the daughters and sons-in-law of plaintiff, had conspired and confederated to thwart the purpose pursued to acquire their depositions for use in the case. It is clear enough the court so found the fact to be and no one can doubt that plaintiff is estopped from complaining on this score, because of the fact of such wrongful conspiracy to which plaintiff was a party.

Digitized by Google

But it is said plaintiff ought not to be required to pay the costs of so much of the depositions as is devoted to the ascertainment of the whereabouts of plaintiff. It is true a portion of the examination of the witnesses is devoted to this matter, but the evidence with great force suggests a conspiracy on the part of plaintiff and her daughters and their husbands to defeat the right of defendant to take plaintiff's depositions. As before said, notice to take plaintiff's deposition was duly given and a subpoena issued and she immediately before service departed from St. Louis. Her two daughters about the same evening left their homes and spent the night at the Terminal Hotel under assumed names with a view of evading service of the subpoenas. One of the sons-in-law and his wife accompanied plaintiff to the train and assisted her in boarding it for Chicago. Defendant was at a loss to locate her whereabouts and certainly had a right to examine the members of her family touching the same. Section 6356, Revised Statutes 1909, provides that any party to a civil action may compel an adverse party to testify as a witness in his behalf in the same manner and subject to the same rules as other witnesses. And section 6361, Revised Statutes 1909 provides that if an adverse party on being duly summoned refuses to attend and testify either in court or before any person authorized to take his deposition, besides being punished himself as for a contempt, his petition, answer or reply may be rejected, or a motion, if made by himself, overruled, or, if made by the adverse party, sustained. No one can doubt that under these statutes defendant had the right to take the deposition of plaintiff for the legitimate purpose of use at the trial, and the court evidently found such was the purpose of defendant. [See Tyson v. Farm, etc., Assn., 156 Mo. 588, 57 S. W. 740; Matthews v. Mo. Pac. R. Co., 142 Mo. 645, 44 S. W. 802.] The mere fact that defendant desired the depositions to aid it in preparing its de-

Digitized by Google

fense to the case, as is usually true, is not enough to defeat the right to take the deposition of the adverse party, provided it appears, too, that such deposition is taken in good faith for a legitimate use—that is, to actually use it in the trial of the case. The evidence amply supports the judgment to the effect that defendant was acting in good faith throughout and intended to use the deposition of plaintiff at the trial of the case, and it supports, too, the theory advanced that plaintiff and her daughters had conspired to thwart defendant of its right sought to be exercised for a legitimate and proper purpose. That plaintiff may not avail herself of benefits ensuing from her own wrong is a maxim of high import in the law, which, as appears from the history of our jurisprudence, universally entails a just result. On this it would seem the principle of estoppel again interposes and precludes her right to complain with respect to so much of the depositions as were directed toward disclosing her whereabouts, for, as before said, it appears she had wrongfully conspired with the other witnesses, members of her family, to defeat defendant in the exercise of its lawful right in the premises.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

ROLAND VAN HOEFFEN, Respondent, v. COLUMBIA TAXICAB COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **APPELLATE PRACTICE: Conclusiveness of Verdict.** A verdict on conflicting evidence is conclusive, on appeal.

2. **CARRIERS OF PASSENGERS: Taxicab Company.** A taxicab company following the business of transporting persons for hire and holding itself out to carry one and all is a common carrier of passengers, and is subject to all the liabilities of such a carrier.

Digitized by Google

3. ———: **Protection of Passengers: Duty of Carrier.** It is the duty of a carrier of passengers to protect passengers from insult and assault by its own servants and by outsiders; its obligation with respect to protecting him from insults and assaults at the hands of its own employees being that of an insurer.

4. ———: **Assault of Passenger: Right of Recovery: Authority of Chauffeur.** It is not essential to a recovery by a taxicab passenger, assaulted by and arrested on the request of a driver who had charge of the cab and was authorized to collect fares, that he show that the driver was acting within the scope of his authority, since the acts of the driver constituted a breach of the carrier's duty to protect the passenger against insults and assaults by its employees.

5. ———: ———: **Continuing Assault.** In cases of a continuing assault or restraint of liberty of a passenger by a servant of the carrier, initiated on or within the conveyance and continued after the passenger has alighted from it, the law will not undertake to determine whether the acts of the servant committed after the passenger had alighted were beyond the scope of his authority, but will treat the whole matter as having occurred while the passenger was under his care, so as to impose liability on the carrier for all such acts.

6. ———: ———: ———. Where the driver of a taxicab, who was in charge of the cab and authorized to collect fares, held a passenger prisoner in the cab for some time until he was finally able to force open the door and alight, and then caught and held him prisoner on the street, and caused him to be arrested and detained until an excessive fare was paid, the assault was a continuing one, beginning with the imprisonment in the cab.

7. ———: **Existence of Relation.** The rule, that the relation of carrier and passenger is ended when a carrier maintaining no station stops its vehicle and the passenger alights therefrom on a public street, is not applicable where the passenger is not permitted to remove his belongings from the vehicle or to depart therefrom free from insult or injury at the hands of the carrier's servants; and hence where the driver of a taxicab held a passenger prisoner in the cab for some time until he was finally able to force open the door and alight and then caught and held him prisoner on the street and caused him to be arrested and detained until an excessive fare was paid and refused to allow him to remove his grip from the cab, the relation of passenger and carrier existed during all that time.

Digitized by Google

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench,* Judge.

AFFIRMED.

Ryan & Thompson for appellant.

(1) The demurrer to the evidence should have been sustained. Whether plaintiff was arrested "while a passenger in and on one of defendant's cabs" and said arrest was continued thereafter, or whether he was not arrested until after he had voluntarily alighted from said cab, in either event it was incumbent upon the plaintiff to prove that the chauffeur had authority from defendant to so arrest, and the evidence having shown expressly that he had no such authority, plaintiff was not entitled to recover. Grayson v. Transit Co., 100 Mo. App. 60; Dwyer v. Same, 108 Mo. App. 152. (2) Besides plaintiff will not be permitted to sue upon a cause of action arising out of alleged breach of duty growing out of the relation of carrier and passenger and recover for the violation of a duty growing out of the relation of master and servant. The distinction between the two causes of action is well marked and has been consistently observed by the appellate courts of this State. Raming v. Railroad, 157 Mo. 477; Farber v. Railroad, 116 Mo. 81; McPeak v. Railroad, 128 Mo. 617; Snyder v. Railroad, 60 Mo. 413; Keen v. Railroad, 129 Mo. App. 301; McDonald v. Railroad, 165 Mo. App. 75. (3) When the plaintiff, at his own suggestion and of his own volition, alighted from the cab in safety to the street, he thereupon ceased to be a passenger. Defendant's liability thereafter is to be determined by the law of master and servant and plaintiff does not seek to recover on the theory of the existence of that relation. Grayson v. Transit Co., 100 Mo. App. 73; McDonald v. Railroad, 165 Mo. App. 75;

Digitized by Google

Nener v. Railroad, 143 Mo. App. 407-8; Senf v. Railroad, 112 Mo. App. 74; Ickenroth v. Transit Co., 102 Mo. App. 597; O'Brien v. Transit Co., 185 Mo. 263; McQuerry v. Railroad, 117 Mo. App. 255; Flynn v. Transit Co., 113 Mo. App. 185; Devoy v. Transit Co., 192 Mo. 210. (4) The defendant is not liable for the conduct of its servant who falsely arrests one not a passenger because such one refuses to pay his cab fare. A servant with authority to collect a debt has no authority to arrest the debtor for refusal to pay. Grayson v. Transit Co., 100 Mo. App. 73; Collette v. Revori, 107 Mo. App. 711; Milton v. Railroad, 193 Mo. 46; McDonald v. Railroad, 165 Mo. App. 108; Drolshagen v. Railroad, 186 Mo. 258; Farber v. Railroad, 32 Mo. App. 378, 116 Mo. 81; Krueger v. Railroad, 84 Mo. App. 358.

Charles E. Morrow for respondent.

(1) Plaintiff was first imprisoned in the taxicab. He thereafter alighted to the street, but was still held and imprisoned in the street by the side of the taxicab until his arrest was procured by a police officer. Plaintiff did not cease to be a passenger by alighting to the street where he was still imprisoned until his arrest was procured. It was a continuous transaction and defendant is liable for the actions of its servants on the principle of *respondeat superior*. Of course, it grows out of the relation of master and servant, but the duties of the servant to the passenger control in determining the scope of the authority of the servant. McDonald v. Railroad, 165 Mo. App. 107; Dwyer v. Transit Co., 108 Mo. App. 152; O'Brien v. Transit Co., 185 Mo. 263; Flynn v. Transit Co., 113 Mo. App. 185; McQuerry v. Railroad, 117 Mo. App. 255; Grayson v. Transit Co., 100 Mo. App. 60. The facts in this case show an abuse of the authority of the servants of defendant and not the lack of authority. Dwyer v. Tran-

Digitized by Google

sit Co., 180 Mo. App. 152; McDonald v. Railroad, 165 Mo. App. 107. (2) But even if plaintiff ceased to be a passenger when he alighted from the cab to the street defendant's servants having commenced the imprisonment while plaintiff was a passenger and continued it, the defendant is liable for all their acts as being within the scope of their authority. McDonald v. Railroad, 165 Mo. App. 107; Flynn v. Transit Co., 113 Mo. App. 185; McQuerry v. Railroad, 117 Mo. App. 255.

NORTONI, J.—This is a suit for damages said to have accrued to plaintiff through his alleged false arrest by defendant. Plaintiff recovered and defendant prosecutes the appeal.

The suit proceeds as if the relation of passenger and carrier obtained between the parties at the time of the grievance complained of, and the question for consideration pertains to that subject-matter.

It appears defendant is an incorporated company engaged in the business of operating taxicabs in the city of St. Louis for the accommodation and transportation of all persons who may apply to it to convey them from one point to another. It owns, maintains and operates about forty such conveyances, in which passengers are transported about the city for hire. Moreover, defendant maintains a number of stations at prominent points in the city, from whence transportation on one of its taxicabs may be had, or where one may be called into the service of a passenger. One of such stations is maintained by defendant at the Planters Hotel, and it was from this one that defendant undertook to transport plaintiff to his home at No. 858 McLaran avenue, St. Louis.

It appears plaintiff visited this station and inquired of defendant's chauffeur the fare to be paid for his carriage in a taxicab from that point to his home, at the number above mentioned. The chauffeur in

Digitized by Google

charge of the taxicab referred plaintiff to defendant's superintendent, who was stationed there in an office, for the information desired. Defendant's superintendent consulted the book, and besides remarking that the destination desired was 8400 north, stated the fare would be $3.70. Plaintiff accepted the proffer thus made and entered the cab for transportation. Besides the regular chauffeur on the taxicab, another man in uniform as a taxicab driver accompanied the chauffeur and rode on the seat with him. It is suggested by plaintiff that this extra man on the seat accompanied the chauffeur as a guard against impending assault from striking taxicab drivers, but this we regard as wholly immaterial to the issue made. At any rate, after having thus taken passage in defendant's conveyance, plaintiff was transported therein to within about a block from his residence, when it is said the taxicab became stalled or refused to proceed for some reason unknown to him. Thereupon plaintiff said to the chauffeur that he would pay his fare and walk from thence homeward, as it was but a short distance, and to this the chauffeur acceded. According to the evidence of plaintiff, he took from his pocket $3.70 while yet sitting in the taxicab and laid it on the seat on the box beside the chauffeur in settlement of the charge for transportation. The chauffeur did not accept the amount thus tendered, but looked at and read the meter on the conveyance and demanded five dollars for his transportation, saying such was the amount the meter registered as due, in accordance with the miles traveled. Plaintiff insisted that he had contracted in the presence of the chauffeur with defendant's superintendent for transportation home at the price of $3.70 and that this was all he would pay. Whereupon, it is said both defendant's chauffeur, whom the evidence shows to be authorized to collect fares for defendant, and his companion, took hold of the door on either side of the taxicab and imprisoned

Digitized by Google

plaintiff therein demanding that he should pay five dollars instead of $3.70.

It is said the two men, one stationed at either side of the cab, restrained plaintiff of his liberty and confined him therein for about one minute and rudely demanded that he should pay the five dollars so registered by the meter. After being thus restrained for about one minute, plaintiff says he opened the door of the taxicab and stepped out of the same upon the ground in the street, where defendant's chauffeur and his companion laid hold of him and restrained him for a considerable time, insisting that he should pay the five dollars demanded. Both the chauffeur and his companion, according to plaintiff's story, treated plaintiff rudely while thus standing beside the cab, held him fast by the arms, cursed and abused him and threatened to call a policeman. A considerable time was occupied in the argument while the parties stood beside the conveyance in the street, and plaintiff's grip, or hand bag, remained therein and a large number of people assembled there to view and witness the controversy. Plaintiff insisted that he owed but $3.70 and this he repeatedly offered to pay, while defendant's chauffeur insisted he should pay the five-dollar charge, and presently the chauffeur added an additional twenty cents for waiting time and then demanded $5.20 instead of five dollars as before. When about ten minutes had elapsed and the controversy still continued, defendant's chauffeur repaired to a near-by police station, leaving plaintiff in the meantime in charge of his companion, and enlisted the services of a policeman to enforce the payment of the five-dollar charge. Probably twenty minutes thereafter the policeman arrived with defendant's chauffeur and insisted that plaintiff should pay the amount charged by the chauffeur or accompany him to the station. Plaintiff declined to pay the bill and repeatedly tendered $3.70 instead. It is said the chauffeur insisted upon

Digitized by Google

the policeman aresting plaintiff and he did so. By this time a large number of the residents of the neighborhood had assembled at the scene and among them plaintiff's father and his sister. Plaintiff's father offered to pay the charge of $5.20 but plaintiff refused to permit him to do so, and stated that he had contracted with defendant for conveyance home for $3.70. Whereupon the chauffeur's companion and the police officer in charge of plaintiff, together with plaintiff's father and sister, all repaired to plaintiff's home, a block away, and entered the residence. Here it is said pliantiff's father paid the charge demanded by the chauffeur and the chauffeur's companion and the police officer departed.

The evidence on behalf of defendant is in many respects about the same as that for plaintiff. The principal discrepancy in the evidence on behalf of defendant and that for plaintiff pertains to the matter of the restraint laid upon plaintiff at the initiation of the controversy. Defendant's chauffeur and his companion deny that they restrained plaintiff of his liberty within the taxicab by holding the door on either side and preventing him from alighting therefrom. However, they admit the controversy which ensued in the public street by the side of the car over the collection of the fare, but say they did not lay hands on plaintiff there. But it was admitted, too, by defendant's chauffeur on the stand that he called the policeman and invoked his aid in collecting the fare and that his companion and the police officer accompanied plaintiff to his home where the father paid it. Defendant's superintendent says that he did not enter into a contract with plaintiff to transport him for $3.70, but when the inquiry was propounded to him touching the fare for the transportation, he consulted his book and, upon discovering the point of destination to be 8400 north, said the fare would be about $3.70, giving this amount as an estimate only. But be all of this as it may, the

Digitized by Google

jury found the issue for plaintiff as though $3.70 was the agreed price for the transportation, and that matter is thus concluded here.

Defendant is pursued as a common carrier, for that it breached its obligation to accord the passenger just and decorous treatment and protect him from insult and injury, while the relation of passenger and carrier obtained, in restraining plaintiff of his liberty within the conveyance and causing his arrest by a policeman immediately after alighting therefrom and before the fare was paid and in an endeavor to extort from plaintiff money not justly due it. It seems to be conceded on the part of defendant that it is a common carrier of passengers and was engaged in such calling at the time. But it is urged the court should have directed a verdict for it because there is no evidence tending to prove that, though its chauffeur restrained plaintiff of his liberty within the car and occasioned his arrest by the police officer immediately after alighting therefrom, such chauffeur was acting within the scope of his authority thereabout so as to entail liability upon defendant for his wrongful act. Obviously this argument is unsound, for if defendant is a common carrier of passengers and was engaged in that calling at the time, the chauffeur's authority to represent it in that behalf is to be declared as a conclusion of law on the facts in evidence. The case concedes that the chauffeur was authorized to collect fares from the passengers which defendant transported in its taxicabs and that such chauffeur was in charge of the conveyance.

The evidence is direct and positive to this effect. It appears defendant owned and operated forty taxicabs in the city of St. Louis and that it maintained stands or stations at prominent places throughout the city where transportation might be had in such taxicabs or they might be called into service where required. Defendant followed the business of transport-

Digitized by Google

ing persons for hire from one part of the city to another and held itself out to serve one and all who should apply to it for transportation upon the payment of the fares agreed upon or usually charged. This being true, it is, of course, a public or common carrier of passengers and through entering that calling assumed all of the obligations incident thereto. [See Hutchinson on Carriers (3 Ed.), secs. 37, 48, 49, 890; Babbitt on Motor Vehicles, secs. 620, 621; Parmelee v. Lowitz, 74 Ill. 116.] Upon entering the taxicab for transportation, plaintiff placed himself in the care and custody of defendant common carrier and defendant assumed toward him the obligation to conduct itself with proper decorum. Moreover, the relation thus established imposed the obligation on defendant carrier, not only to protect plaintiff from insult and assault by outsiders, but from its own servants as well. To this extent the passenger is entitled to the absolute protection of the carrier and to this extent the common carrier is an insurer of his safety and protection from such insults, assaults and humiliation at the hands of its servants. See Hutchinson on Carriers (3 Ed.), sec. 1093; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 268, 84 S. W. 939; McQuerry v. Met. St. R. Co., 117 Mo. App. 255, 92 S. W. 912.] Touching this question, Judge Elliott says, in his splendid work on Railroads, Vol. 4 (2 Ed.), sec. 1638:

"A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants and shall not be willfully insulted and harmed by them, and if it commits the discharge of this duty to an employee it may well be held to do so at its peril, notwithstanding the exercise and care on its part in selecting its servants. Either the company or the passengers must take the risk of the infirmities of temper, maliciousness and misconduct of the employee whom the company has placed upon the train and to

Digitized by Google

whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take the risk and hold it responsible."

It is, therefore, obvious that it is not essential to plaintiff's right to recover that he should show the chauffeur was authorized by defendant to restrain him of his liberty or to occasion his arrest by the policeman, so long as he was acting in the purview of his employment in charge of the taxicab and in and about the collection of the passenger's fare. This is true because defendant failed in its duty to protect plaintiff from insult and injury at the hands of its own servants. [Keen v. St. Louis, I. M. & S. R. Co., 129 Mo. App. 301, 108 S. W. 1125.] It is conceded that the chauffeur had charge of the car and that it was his duty to collect the fares. This being true, the law concludes that the act of the chauffeur in restraining plaintiff of his liberty while within the cab and upon alighting therefrom and in calling a policeman to arrest him while standing beside the cab, all to the end of collecting the fare, was the act of defendant then and there being present in the person of the chauffeur. [Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303; Grayson v. St. Louis Transit Co., 100 Mo. App. 60, 71 S. W. 730.]

Moreover, it is obvious such must be true on the facts of the instant case, for, according to the evidence of plaintiff, the assault was a continuing one which commenced within the taxicab and continued in the street beside the conveyance thereafter. In restraining plaintiff's liberty within the cab and laying hands upon him to the end of collecting the fare upon his alighting therefrom and calling a police officer to effectuate his arrest, which was done, the chauffeur represented defendant beyond question, for the re-

Digitized by Google

straint of liberty first imposed within the cab was continued by the subsequent conduct until plaintiff's arrest by an officer was actually had. [See Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303; Grayson v. St. Louis Transit Co., 100 Mo. App. 60, 71 S. W. 730; O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939; Flynn v. St. Louis Transit Co., 113 Mo. App. 185, 87 S. W. 560; McQuerry v. Met. Street Ry. Co., 117 Mo. App. 255, 92 S. W. 912; Savannah Street, etc., Co. v. Bryan, 86 Ga. 312; Wise v. Covington, etc., Street Ry. Co., 91 Ky. 537.] In such cases of continuing assault or restraint of liberty, initiated on or within the conveyance, the law will not undertake to summarily determine a portion of the servant's conduct, even in the relation of master and servant, as beyond his authority, but rather remits the whole matter to be considered as at the beginning of the controversy and in the source of the servant's power. [See McDonald v. St. L. & S. F. R. Co., 165 Mo. App. 75, 146 S. W. 83; New Ellerslie Fishing Club v. Stewart, 123 Ky. 8, 93 S. W. 598, 9 L. R. A. (N. S.) 475.]

It is argued the court erred in instructions given for plaintiff and in refusing certain instructions requested by defendant, in that it omitted to recognize a distinction which it is said inheres in the case sufficient to acquit defendant of all liability for the acts of the chauffeur. This argument proceeds from the fact that defendant's evidence tends to prove that, though plaintiff was taken into custody by the police officer at the instance of the chauffeur, this all occurred in the street after plaintiff had alighted from the taxicab. It is urged that if such be true, no responsibility may be entailed on defendant for the wrongful act of the chauffeur, for the reason that plaintiff was not a passenger at the time and the controversy was solely one between plaintiff, a stranger to defendant, and its chauffeur. Both defendant's chauffeur and his com-

Digitized by Google

panion testify that they did not imprison plaintiff within the cab—that is to say they did not hold the doors and forbid plaintiff from alighting therefrom, as stated by him. Furthermore, these witnesses say they did not lay hands on plaintiff when he alighted from the cab into the street, but admit that they detained him there beside the cab in controversy about the fare and that defendant's chauffeur went after and brought a policeman who took plaintiff into custody. However, during all of this time plaintiff's grip, or hand bag, remained within the cab and the chauffeur forbade plaintiff to remove it. The chauffeur testified that, as the meter registered a five dollar charge, he would be called upon to make it good to defendant company if plaintiff did not do so.

Concerning the detention of plaintiff beside the cab in the street during the interim until the police officer arrived, the chauffeur testified as follows: "Q. You wanted also to see that Mr. Van Hoefen (plaintiff) didn't get away? A. I was going to see myself in the clear; I was not going to stand the bill. Q. You didn't intend to let him get away at that time? A. Not until I got my money." The chauffeur then says that upon arriving upon the scene with the officer, he called his attention to the meter. "Then the officer asked me if I wanted to have him arrested. I told him no; if he paid the bill I didn't care to have him arrested, and his father then, I believe, told this fellow that I had with me to come up to the house and he would settle it, and they went up to the house then."

It appears from all of the evidence that the policeman, after being called by the chauffeur and after an unsuccessful effort to induce plaintiff to pay the charge, took him into custody and accompanied him to his residence, where plaintiff's father paid the $5.20 demanded. If the relation of passenger and carrier continued between plaintiff and defendant at the time, there can be no question about the instructions given

Digitized by Google

in the case at the instance of plaintiff and those requested by, but refused to, defendant. It is urged by defendant that the relation of passenger and carrier terminates immediately upon the passenger's stepping from the conveyance upon the street and no doubt such is usually true, when nothing more appears. This is the general rule which obtains as to the termination of the relation when one alights at a proper place in the street from a street car, for that such carrier usually maintains no station there but rather discharges the passengers at appropriate places in the public thoroughfare. [Creamer v. West End Street Railway Co., 156 Mass. 320, 16 L. R. A. 490.] Generally speaking, it would seem for the same considerations that the taxicab should fall within the rule last above stated. But obviously such is not the rule which obtains in a case of the character of this one, for here a further necessity for the relation of the parties continued immediately at the place of the passenger's alighting. Moreover, defendant forbade plaintiff to remove his grip from the cab and there retained it in possession. The point at which the relation of passenger and carrier terminates is not identical in every case, for it essentially turns in a measure upon the facts and circumstances attending the different transactions. Then, too, besides the character and mode of conveyance, the injury complained of and how and where it was received, together with the particular transaction in process between the parties at the time, is to be considered.

Mr. Hutchinson, in treating of this question, says:

"As a general rule, it may be said that the relation of carrier and passenger does not cease with the arrival of the train at the passenger's destination, but continues until the passenger has had a reasonable time and opportunity to safely alight from the train at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises in

Digitized by Google

the customary manner." [Hutchinson on Carriers (3 Ed.), sec. 1016.]

Judge Elliott, in his work on Railroads, Vol. 4 (2 Ed.), sec. 1592, says:

"The general rule is that the relation of carrier and passenger does not terminate until the passenger has alighted from the train and left the place where passengers are discharged."

Touching the same question the Cyclopedia of Law and Procedure, Vol. 6, p. 542, says:

"After the passenger has departed from the car, and has had reasonable time and opportunity to avoid further danger from the operation of the car, *or further necessity of relation with the servants of the carrier,* he ceases to be a passenger and stands toward the carrier as one of the general public." (Italics are our own.)

In those cases involving transportation companies which maintain stations and discharge passengers thereat, the courts universally declare that the relation of passenger and carrier continues, not only until the carriage has arrived at the destination of the passenger, but until the passenger has safely alighted and at least moved away from the immediate vicinity of the conveyance. In such cases, it is said, having surrendered himself to the care and keep of the carrier, the passenger is entitled to the exercise of high care on its part to afford him a proper egress from the conveyance and into and through the carrier's station and unless such is afforded the relation of carrier and passenger continues and may be utilized to the end of compensating an injury suffered by the passenger because of such omission. [Chicago Terminal, etc., R. Co. v. Schmelling, 197 Ill. 619; Pennsylvania Co. v. McCaffrey, 173 Ill. 169; C. & A. R. Co. v. Tracey, 109 Ill. App. 563; King v. Central, etc., R. Co., 107 Ga. 754.] Such is the law, too, of this State with respect to the right of ingress and egress to and from the

Digitized by Google

trains of the carrier. [Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314; Robertson v. Wabash R. Co., 152 Mo. 382, 53 S. W. 1082; Reynolds v. St. Louis Southwestern R. Co., 162 Mo. App. 618, 142 S. W. 1097.]

But the precise obligation of the carrier involved here is that which assures to the passenger decorous treatment and protects him from insult and assault from the carrier while the relation continues. This obligation inures in favor of a passenger who has alighted from the train and while he yet remains for a reasonable time in the station house of the carrier. Until such a reasonable time has expired, the relation of carrier and passenger is said to continue. [See Houston v. Batcheler (Tex. Civil App.), 73 S. W. 981; 4 Elliott on Railroads (2 Ed.), sec. 1592; Hutchinson on Carriers (3 Ed.), sec. 1016.] So, too, is the passenger within the care and protection of the carrier not only until he has actually alighted from a conveyance, such as a street car, into the street, but is permitted to depart therefrom free from insult and injury at the hands of the defendant's servants in charge. Such, in substance, is the judgment of the court given in Flynn v. St. Louis Transit Co., 113 Mo. App. 185, 87 S. W. 560, for there, though the assault was first commenced on the car, it seems to have been renewed after the passenger alighted in the street. Upon the passenger's alighting in that case, he attempted to take up his umbrella, which remained on the platform of the car, and was kicked by the conductor. The court declared the relation of passenger and carried continued at the time. Here, the carrier forbade plaintiff his grip during the *melee* in the street.

Moreover, the authorities rule that if the passenger, after alighting from the conveyance, tarries about it in the transaction of business with the employees of the carrier, the relation of passenger and carrier continues the while; for instance, as where the pas-

Digitized by Google

senger is engaged in assisting the carrier's servant about unloading his baggage from the conveyance and loses his life from the starting of the locomotive. In such a case, the Supreme Court of Texas declared the relation of passenger and carrier continued to obtain and the carrier should respond thereon. [See Ormand v. Hayes, 60 Tex. 180. See, also, Burnham v. Wabash, etc., R. Co., 91 Mich. 523.] It is certain that the passenger has a right to pass from the conveyance at the end of his journey in safety—that is, free from the assaults of the carrier's servants. Therefore, it would seem the principle attending the obligation continues to afford protection to the passenger until the further necessity of relations with the servants of the carrier at and in the vicinity of its conveyance as by way of the settlement of the charge for the transportation is passed. [See 6 Cyc. 542; Hutchinson on Carriers (3 Ed.), sec. 1016; Elliott on Railroads (2 Ed.), sec. 1592.] Obviously the passenger may not be ruthlessly assaulted by the carrier's servant without liability on its part while in the very act of paying the charge of transportation, claiming his baggage and departing from the place at which he alighted, for until then the law protects him as within the care of the carrier. Though the journey is ended, the passenger is clearly within the protection of the carrier and the relation continues until the settlement of fare is made and he is permitted by the carrier to take his leave in peace.

In this view, it will be unnecessary to consider the instructions, and the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

MAURICE KEILY et al., Respondents, v. KNIGHTS OF FATHER MATTHEW, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Action on Certificate: Defenses: Burden of Proof.** In an action on a certificate issued by a fraternal beneficiary association, the introduction of the certificate and proof of the death of the member made a prima-facie case, and the burden was then on defendant to establish its defense that the member resigned from the association prior to his death, since the status of a member, as such, is presumed to continue until the contrary is made to appear.

2. **———: ———: ———: Question for Jury.** In an action on a certificate issued by a fraternal beneficiary association, *held* that it was a question for the jury, under the evidence, whether insured had resigned from the association, as alleged by defendant in defense of the action, and hence it was error to direct a verdict for defendant.

3. **———: Voluntary Associations: Right of Member to Resign.** Unless the compact between the members of a voluntary association otherwise provides, a member may withdraw from it at any time without the consent of the association subject only to the right of the association to enforce against him any obligation incurred by him during his membership; and hence where a member of a fraternal beneficiary association resigned in open meeting of a subordinate lodge of the association, it was not essential that the association act upon the resignation, in order to terminate the relations between it and the member.

4. **TRIAL PRACTICE: Credibility of Witnesses: Question for Jury.** The credibility of the witnesses and the value and the weight to be given to their testimony are questions for the jury.

5. **FRATERNAL BENEFICIARY ASSOCIATIONS: Resignation of Member: Evidence.** On the question of whether a member of a fraternal beneficiary association resigned therefrom in open meeting of a subordinate lodge of the association, the testimony of a witness present at such meeting, that he heard no such announcement by the member, possessed probative force and was to be received and considered with the other facts and circumstances, since a negative fact may be shown by negative evidence.

Digitized by Google

6. **EVIDENCE: Negative Evidence.** Negative facts may be shown by negative evidence.

7. **FRATERNAL BENEFICIARY ASSOCIATIONS: Resignation of Member: Evidence.** On the question of whether a member of a fraternal beneficiary association resigned therefrom in open meeting of a subordinate lodge of the association, the testimony of a witness, that, after the member had expressed his dissatisfaction at a raise in the rate of assessments, he walked to the secretary's desk, and, waving his passbook in the air, said, "I am done," did not conclusively establish that he had resigned, so as to justify the court's declaring such to be the fact as a matter of law, since the member may not have intended such expression as a resignation.

8. **TRIAL PRACTICE: Intention: Question for Jury.** The question of intention not clearly expressed is one *in pais*, to be ascertained and determined by the triers of fact, and not declared as a conclusion of law.

9. **———: Uncontradicted Evidence: Question for Jury.** Where a prima-facie case is once made, it is improper for the court to declare that such prima-facie case is overcome as a matter of law by the introduction of mere oral evidence and facts *in pais* short of admissions, even though such evidence appears to be abundant to do so and remains uncontradicted.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock,* Judge.

AFFIRMED AND REMANDED.

Ryan & Thompson for appellant.

(1) The trial court was right in sustaining the demurrer at the close of plaintiff's case, as the evidence, oral and written, uncontradicted and unimpeached, was conclusive that Mr. Keily had resigned. A verdict for plaintiff could not have been rested on any evidence, but would have been based purely on conjecture. Richey v. Woodmen of the World, 163 Mo. App. 235; Newland v. Modern Woodmen of America, 168 Mo. App. 311. (2) If this court will consider the question raised at the trial, and decided adversely

Digitized by Google

to plaintiff, touching the admission of testimony that there was a custom requiring a resignation to be in writing, and formally accepted by the council, then we submit the court's ruling was correct. The order being a mere voluntary association a member may at any time sever his connection therewith. Lewin v. Grand Lodge, etc., 104 Mo. App. 20; State ex rel. v. Grand Lodge, etc., 78 Mo. App. 546; Miller v. Grand Lodge, etc., 72 Mo. App. 505; Stewart v. Supreme Council, etc., 36 Mo. App. 319; Borgraefe v. Knights of Honor, 26 Mo. App. 218; 1 Bacon on Benefit Socities, sec. 111.

Johnson, Rutledge & Lashly for respondent.

(1) Where it is conceded that plaintiff has made a prima-facie case in a suit on a benefit certificate and where only conflicting evidence is developed on defendant's case on a defense that the member resigned, the case must go to the jury. Troll v. Home Circle, 161 Mo. App. 719; Boone v. Railroad, 20 Mo. App. 235; Hirsch v. Grand Lodge, 78 Mo. App. 361; Jefferson v. Life Assn., 69 Mo. App. 133; Dawson v. Wombles, 111 Mo. App. 540; Reynolds v. Hood, 209 Mo. 618; Gannon v. Gas Light Co., 145 Mo. 514; Hegenburg v. Frisco, 147 S. W. 193. (2) Abandoned pleadings of the opposite party are proper evidence as admissions. The abstract shows that the abandoned answer offered in this case conceded that the deceased was a member until November first, or after the date on which it is claimed by defendant he resigned. Spurlock v. Railroad, 125 Mo. 104; Overton v. White, 117 Mo. App. 576; Meriweather v. Knapp, 224 Mo. 617. (3) A custom of receiving only written resignations and officialy acting upon them only in open meetings which had been adhered to for twenty years is as binding on a fraternal society as if embodied in a by-law. Especially is such the case where (as here) there

Digitized by Google

is no by-law or other regulation on the subject in issue. State v. Grand Lodge, 70 Mo. App. 456; 5 Am. & Eng. Ency. Law, 91; Henry v. Jackson, 37 Vt. 431; 10 Cyc. 354. Abandonment of an insurance contract is largely one of intent. Insurance benefits in a fraternal order are dependent on the status of one as a member. 3 Cooley's Briefs on Insurance, 2835; Hyatt v. Legal Protective Assn., 106 Mo. App. 610. The status of a member once fixed is presumed to continue. The issuance of a benefit certificate is prima-facie proof of good standing. Stewart v. Supreme Council, 36 Mo. App. 329; 3 Cooley's Briefs on Insurance, 2425.

NORTONI, J.—Defendant appeals from an order of the court setting aside a judgment of involuntary nonsuit entered against plaintiff. The suit is on a certificate of life insurance issued by defendant, a mutual benefit society.

The sole defense relied upon in the answer is that the insured member voluntarily resigned his membership in the order shortly prior to his death. This defense, however, is denied in the reply and a sharp issue is made concerning it. Plaintiffs are children of the inusred member, and it is conceded that they are the proper beneficiaries and as such entitled to recover, provided the insurance contract obtained at the time of the death of their father.

It appears that at the trial plaintiffs introduced in evidence the benefit certificate issued by defendant order to their father several years before, and established the fact of his death, which is conceded. A prima-facie case for them having thus been made, defendant assumed the burden of establishing the defense set forth in its answer—that is, that David Keily, the insured member, resigned from the order in open meeting of his council on October 27, 1910. It appears that on November twelfth the insured took sick and departed this life November 24, 1910. The

Digitized by Google

evidence introduced by defendant is quite convincing that Keily resigned his membership in the order, as insisted in the answer, but, of course, is not conclusive on the court to that effect, and especially is this true when considered in connection with that given for plaintiffs in rebuttal.

It appears that at a recent convention of the order, the Knights of Father Matthew, the rates for insurance had been readjusted and the new rating fell with a heavy hand upon the older members. Keily, the insured, was an elderly man and had been a member of the order for many years. According to the new rates he would be required to pay on his $2000 insurance an assessment of about $7.28 per month, whereas theretofore he had paid but $3.58 on the same. He and others of the older membership affiliated with St. Bridget's Council in St. Louis were greatly displeased because of this. On the night of October 27, 1910 this matter was freely discussed at the meeting of St. Bridget's Council, of which Keily was a member, and he participated in the discussion. The record reveals that the meeting was more or less a stormy one and a number of the members expressed themselves with considerable force and vehemence on the subject. Mr. Keily was a man of determination and spoke with emphasis suggesting that the recent rerating was unjust to himself and many of the others situated like he. Finally, during the meeting, Mr. Keily went forward to the desk of the secretary and paid his last previous assessment, it is said that falling due on September thirtieth. A number of witnesses on the part of defendant who were present say that Mr. Keily then declared that he resigned from the order and would no longer affiliate with it; that he turned around after paying the financial secretary and waved his passbook over his head as if greatly vexed and openly asserted his resignation from the order in open meeting. However, it does not appear that the

Digitized by Google

meeting acted upon such resignation, if it was offered, as the presiding officer did not lay it before the council. But the secretary made a minute during the meeting to the effect that brother David Keily resigned from the order and spread this upon the records of the council a few days thereafter. Although this minute was afterwards spread upon the record, it was not read to the council until at a meeting after the death of the insured.

There is evidence, too, on the part of defendant that some of the members besought the insured not to resign from the order but to continue as a social member even though he abandoned his insurance. It is said that Mr. Keily paid no heed to these friendly suggestions and said that he was "done." Several witnesses for defendant having stated the facts to have transpired at the meeting of the council as above set forth, plaintiffs introduced others in rebuttal. One of these witnesses introduced by plaintiffs is an eminent expert on handwriting, who testified that upon carefully inspecting the passbook of David Keily, the insured member, it appeared the last assessment paid by him, according to the entry in the passbook, was on October 28, 1910 instead of October 27, the date of the meeting. Moreover, the insured's passbook itself bearing the date was introduced in evidence and exhibited to the jury. This evidence, of course, tends in a way to contradict defendant's theory that Keily paid his last assessment on October 27 in open meeting, and tends to show he acted the part of a member thereafter. Plaintiffs likewise introduced two witnesses, members of the order, who were present at the meeting and were, no doubt, so situate as to observe and know what occurred there in respect of remarks addressed openly to the meeting as such, that is in contradistinction to private remarks or conservation. One of these witnesses, Mr. John T. Hunt, stated that he, too, participated in the discussion of the rates and

Digitized by Google

that he sat within three or four feet of Mr. Keily throughout the evening. Concerning the asserted resignation of Keily from the order, Mr. Hunt says he heard no such remark. He saw Mr. Keily leave his chair and walk forward to the secretary's desk, which, it appears, was situate about fifteen or twenty feet distant from the witness. This witness says, "He walked up to that table and then he said to the secretary—I didn't hear, but he took his book as he turned around, and he made a kind of what I thought a defiant swing with his passbook, and came back and sat down, I think a little in advance of where he was seated before." At another place the same witness says, "I didn't hear what Mr. Keily said at that table, because it wasn't said in a tone loud enough for me to hear. I was distant from that table, I should judge, about fifteen or twenty feet." It appears from this that the witness had his eye on Mr. Keily all of the time and it may be inferred too that he was situate near enough to him to hear an audible open announcement made in the meeting as for its benefit, though not so situate as to hear a private remark addressed by Keily to the secretary.

The witness Flanagan, introduced in rebuttal by plaintiffs, testifies positively that Mr. Keily did not say he resigned from the order. This witness says, "I sat pretty close to him, probably three or four chairs away from him" and he heard Mr. Keily's remarks addressed to the meeting. The witness says, "Mr. Keily left the chair and walked up to the financial secretary, and went up there with his book, and he turned away after he left the secretary, he held his book up and says 'I am done.' He walks back and somebody then asked about the rate question, and I don't know whether it was Mr. Keily, or not, that asked about the rate question." At another place in his testimony the following questions propounded to, and answers by, this witness appear: "Q. Don't you

Digitized by Google

know that he got up and said 'I resign?' A. No, he didn't say, 'I resign.' Q. What did he say? A. All he said, when he walked away from the financial secretary, he put his book up and said 'I am done.' "

On this evidence and at the conclusion of the entire case, the court gave an instruction at defendant's request peremptorily directing a verdict for it and plaintiffs thereupon took an involuntary nonsuit. Thereafter the court sustained plaintiffs' motion, which was duly filed, to set the nonsuit aside, and reinstated the case on the docket for trial. The appeal is prosecuted from this order, and it is insisted the court erred in sustaining the motion to set aside the judgment of nonsuit, for it is said there was no issue of fact whatever for the jury. We do not accede to this view, however, for obviously it is not within the province of the court to weigh the testimony, give judgment upon the credibility of the witnesses and declare as a conclusion of law that a valid defense appeared —that is, that Keily had actually resigned from the order on October 27. There can be no doubt that, by offering the certificate of insurance in evidence and showing the death of the member, plaintiffs made a prima-facie case, for the status of the member as insured in the order thus shown to be once fixed is presumed by the law to continue until the contrary is made to appear. Thereafter the burden of proof is on defendant to relieve itself from the obligation to respond on the relation, and the contract which is thus prima facie established. [See Stewart v. Sup. Council, etc., 36 Mo. App. 319; Mulroy v. Sup. Lodge, etc., 28 Mo. App. 463; 3 Cooley's Briefs on Insurance, p. 2425.] Plaintiffs thus having made a prima-facie case for the consideration of the jury, it devolved upon defendant to overthrow it by showing that the insured member resigned his membership in the order and thus abandoned his insurance in open meeting of St. Bridget's Council on October 27, 1910.

Digitized by Google

It is entirely true that, unless the compact between the members of a voluntary association provides to the contrary, a member may withdraw from it at any time. The affiliation with such an order is said to be voluntary in character—that is, the act of the member in entering into the order and in remaining in it and in the performance of the duties incumbent upon him by reason of his membership are purely voluntary, and because of this he may withdraw when he chooses, and this, too, without the consent of the association. This right of withdrawal is subject only to the right of the association to enforce against the member any obligations incurred by him to the association during the time that his affiliation with it obtained. [See 1 Bacon, Benefit Societies (3 Ed.), Sec. 111; Borgraefe v. Sup. Lodge, etc., 26 Mo. App. 218; Ellerbe v. Barney, 119 Mo. 632, 25 S. W. 384.] There is no question involved here pertaining to obligations which Keily, the member, assumed to the order meanwhile, and it is therefore clear under the rule of decision above cited that it was competent for him to discontinue his relations with the order and abandon his insurance in the open meeting of the council on October 27th as defendant asserts he did. It was therefore not essential that the council should act upon his resignation, as by accepting it, to the end of terminating the contract relations between the order and the insured. The voluntary resignation, if actually made, sufficed to discontinue the insurance contract as it does not appear that he had paid assessments due after September 30th which, though paid on October 27 or 28, would carry the insurance to November first.

No steps had been taken towards suspending Keily for nonpayment of the assessment called for the month of October, and it may be, though the point is not decided because it is neither made nor involved here, that his insurance continued for that reason until his death on November 24 unless he resigned on

Digitized by Google

October 27. At any rate, the asserted resignation of Keily on October 27 at and in the open meeting of the council is the sole defense relied upon in the answer and invoked at the trial. It is therefore with this alone that the court is concerned.

It appears that some days after the meeting of October 27 Keily was reported by the financial secretary of St. Bridget's Council to the superior office of the order as having resigned and his name was entered there accordingly. But, of course, such is not conclusive on the beneficiaries, plaintiffs here, unless their father actually resigned at the time. There is considerable evidence that he did so, and this, too, in the open meeting and thereafter refused to even affiliate further as a social member of the order without insurance. But there is evidence, too, introduced in rebuttal, tending to prove that the financial secretary received his assessments on October 28 and credited the same as of that date in his passbook. It is true the secretary says he may have made a mistake in entering the date and that he received no assessments from Keily after the meeting of October 27; but be this as it may, the book was in evidence together with the testimony of the expert on handwriting and that of the financial secretary, and no one can doubt the matter of the credibility of the witnesses and the weight to be given and value of their testimony was one for the jury.

Moreover, the testimony of Mr. Hunt goes to the effect that, though he was within fifteen or twenty feet of Keily and looking at him all the time when it is said he resigned, he heard no such statement made by him. It is true this witness says that he did not hear what Mr. Keily said to the financial secretary, but it may be inferred from this that Keily made no statement openly to the council to the effect that he resigned from the order. The evidence of this witness is contradictory to that of others who gave evi-

Digitized by Google

dence for defendant, in that they asserted Keily's resignation was openly made to the council, whereas the witness Hunt says he heard no such statement whatever, and it would seem that a mere private remark to the secretary should not suffice on a matter of such importance. It is true the evidence of Hunt is negative in character, but a negative fact is to be shown by negative evidence. In this view, negative evidence, it is said, inheres with probative force and is to be received and considered by the jury along with the other facts and circumstances appearing in the case. [See Stotler v. C. & A. R. Co., 200 Mo. 107, 98 S. W. 509.]

Furthermore, the evidence of the witness Flanagan, introduced in rebuttal, is pointed and direct to the effect that Mr. Keily did not resign at the time. This witness repeats the statement that Keily said nothing about resigning from the order but merely waved his passbook in the air and said, "I am done." Obviously the court may not declare as a matter of law the meaning involved in the words, "I am done," when considered with relation to the facts in proof. This is within the province of the jury alone, for it is to be ascertained *in pais* and no principles of law whatever intervene for reckoning in the solution. It may be when Keily said, "I am done," he intended the council should understand that he then resigned his membership in the order, or it may be that he intended he was done attending the meetings only, in which latter event he might keep up and continue his insurance thereafter. But it is not for us to say what he intended by those words, for no one can doubt that the question of intention not clearly expressed is one *in pais,* to be ascertained and determined by the triers of fact, and not declared as a conclusion of law in any case, and especially so in one of this character.

Obviously there was sufficient in the evidence introduced in rebuttal to render the question of whether

Digitized by Google

or not Keily resigned in open meeting one for the jury. But aside from this entirely, the question was for the jury even though no evidence in rebuttal whatever was given, for plaintiffs made a prima-facie case as above stated on introducing the certificate and showing the death of their father. It then devolved upon defendant to overcome such prima-facie case by showing to the reasonable satisfaction of the jury that Keily had resigned in an open meeting of the order on October 27. It is an established rule of decision in this jurisdiction, and we believe a wholesome one too, that when a prima-facie case is once made it may not be declared by the court as a matter of law to be overcome by the introduction of mere oral evidence and facts *in pais* short of admissions, even though such evidence appears to be abundant to do so and remains uncontradicted by other testimony given in rebuttal for plaintiff. Even in such a situation, it is said the weight and value of the testimony and the credibility of the witnesses are for the jury to consider and not within the province of the court. [See Gannon v. Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968; 47 S. W. 907; Troll v. Protected Home Circle, 161 Mo. App. 719, 141 S. W. 916.]

We have examined the authorities cited by defendant, and upon scrutinizing them discover nothing in conflict with the rule last stated. The court very properly set the judgment of involuntary nonsuit aside and reinstated the case on the docket for trial. Obviously the facts in the record invoke the consideration of a jury. The order setting aside the nonsuit should be affirmed and the case remanded for further proceedings. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

Digitized by Google

WILLIAM FORNOFF, Respondent, v. COLUMBIA TAXICAB COMPANY, Appellant.

St. Louis Court of Appeals, December 31, 1913.

1. **APPELLATE PRACTICE: Binding Effect of Theory of Litigants.** In an action against a taxicab company, although there was no proof that it was a common carrier, yet, in view of the fact that the case was tried in the trial court and presented in the appellate court by both parties on the theory that it was a common carrier, the appellate court will dispose of it on the theory.

2. **CARRIERS OF PASSENGERS: Protection of Passengers: Duty of Carriers.** A passenger is entitled to proper and decorous treatment from the carrier during the course of his transportation, and the carrier is liable if its servants assault or insult him during such time.

3. **———: Evidence of Relation.** The mere fact that a passenger leaves the conveyance during the transit does not, in and of itself, terminate the relation of the parties, provided he does so for a proper purpose, and especially is this true if he leaves the conveyance only temoparily, with the consent of the carrier's servant in charge.

4. **———: ———: Assault of Passenger: Right of Recovery.** Where a passenger in a taxicab of a common carrier entered a business establishment to procure change with which to pay the driver, and the driver followed him for the purpose of collecting the fare, the relation of passenger and carrier continued to exist, so that the carrier was liable for an assault committed on the passenger by the driver under such circumstances.

5. **———: Creation of Relation.** Wnere one takes passage on the conveyance of a common carrier with a purpose to beat his way, he is a mere trespasser and is not entitled to the care and protection due a passenger.

6. **———: Existence of Relation: Action for Assault: Instructions.** In an action for an assault alleged to have been committed on a taxicab passenger by the driver, where there was evidence that plaintiff entered the taxicab with the intention of refusing to pay fare, it was error to refuse instructions requested by defendant, predicated on such evidence, presenting the issue that the relation of carrier and passenger never existed, and was error to give instructions for plaintiff as-

Digitized by Google

suming that the mere engagement of the taxicab by plaintiff created that relation and ignoring the evidence tending to prove that plaintiff never intended to pay fare.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillen,* Judge.

REVERSED AND REMANDED.

Ryan & Thompson for appellant.

(1) The distinction between a cause of action founded upon a breach of duty incident to the relation of carrier and passenger and a cause of action against the master for the tort of a servant while acting within the scope of his employment, is well marked and has been consistently observed by the appellate courts of this State. One will not be permitted to sue upon a cause of action arising out of alleged breach of duty incident to the relation of carrier and passenger, and recover for the violation of a duty growing out of the relation of master and servant. Ramings v. Railroad Co., 157 Mo. 477; Farber v. Railroad, 116 Mo. 81; McPeak v. Railroad, 128 Mo. 617; Snyder v. Railroad, 60 Mo. 413; Keen v. Railroad, 129 Mo. App. 301; McDonald v. Railroad, 165 Mo. App. 75. (2) At the time the assault occurred plaintiff had ceased to be defendant's passenger. This is true whether the contract of carriage was as testified by the plaintiff, or as testified by the defendant. Grayson v. Transit Co., 100 Mo. App. 73; McDonald v. Railroad, 165 Mo. App. 75; Neuer v. Railroad, 143 Mo. App. 407; Senf v. Railroad, 112 Mo. App. 74; Ickenworth v. Transit Co., 102 Mo. App. 597; O'Brien v. Same, 185 Mo. 263; McQuerry v. Railroad, 117 Mo. App. 255; Flynn v. Transit Co., 113 Mo. App. 185; Devoy v. Same, 192 Mo. 210. (3) The defendant cannot be held liable upon the theory of master and servant, that is, upon the theory that the servant com-

Digitized by Google

mitted the tort while acting for the master within the scope of his employment. This for two reasons: (a) Because this is not the cause of action alleged, nor was the case tried below upon that theory, and (b) because the defendant is not liable for the conduct of its servant who assaults a person, not a passenger, because that person refuses to pay his cab hire. A servant with authority to collect for defendant has not authority to arrest the debtor for refusal to pay. Grayson v. Transit Co., 100 Mo. App. 60; Dwyer v. Same, 108 Mo. App. 152; Collette v. Revori, 107 Mo. App. 711; Milton v. Railroad, 193 Mo. 46; McDonald v. Railroad, 165 Mo. App. 75; Drolshagen v. Railroad, 186 Mo. 258; Farber v. Mo. Pac., 32 Mo. App. 378, 116 Mo. 81; Kruger v. Railroad, 84 Mo. App. 385.

George V. Reynolds for respondent.

(1) The relation of carrier and passenger ceases only when the passenger has departed from the car and had a reasonable time to avoid further danger from the operation of the car, or further necessity of relation with the servants of the carrier. 6 Ency. of Law and Pr. p. 542. As against the assaults and violence of his servants the passenger has the right to claim absolute protection and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger while engaged in the discharge of their assigned and appropriate duties although such abuse may consist in an assault or battery upon the person of the passenger and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger. 2 Hutchison on Carriers, Sec. 1093, p. 1274. The carrier must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and in-

Digitized by Google

sults of his own servants. If this duty to the passenger is not performed; if this protection is not furnished; but, on the contrary, the passenger is assaulted and insulted through the negligence or willful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. 2 Hutchison on Carriers, Sec. 1094, p. 1278. (2) The court will not pick out one single instruction for critical examination, but will read all of the instructions given in a case. If the instructions taken as a whole and read altogether properly declare the law the court will not reverse or remand for minor imperfections in any instruction. McKeon v. Citizens Ry. Co., 43 Mo. 405; Muchlhausen v. Railroad Co., 91 Mo. 332; Yocum v. Town of Trenton, 20 Mo. App. 489; Boler v. Cohen, 42 Mo. App. 97.

NORTONI, J.—This is a suit for damages said to have accrued to plaintiff through an assault upon him by defendant's chauffeur. Plaintiff recovered and defendant prosecutes the appeal.

The suit proceeds against defendant on the theory that it is a common carrier of passengers and as though plaintiff was a passenger at the time the assault was made upon him by the chauffeur. The important question for consideration in the case relates to this matter. There is no evidence in the record tending to prove the nature of defendant's calling. Neither is it admitted to be a common carrier of passengers. However, as the case proceeded to judgment as if defendant were such a carrier and is argued and presented here by both parties on that theory, we will dispose of it accordingly.

Digitized by Google

It appears that plaintiff and his companion, O'Shea, spent the evening in a saloon at the corner of Euclid and McPherson avenues in St. Louis and were drinking more or less during the time. Near or about midnight, plaintiff telephoned for a taxicab to call there for him and his companion. Upon the arrival of the cab, plaintiff and O'Shea entered it, instructing the chauffeur, according to the evidence of plaintiff, to transport them from that point—that is, Euclid and McPherson avenues—to 4261 Page avenue, where O'Shea resided, and from thence to 4222 McPherson avenue, the residence of plaintiff. Plaintiff, it appears, called the taxicab into service and instructed the chauffeur with respect to their destination. According to plaintiff's evidence, the purpose was to transport his companion, O'Shea, to his residence at 4261 Page avenue and from thence transport plaintiff to his home at 4222 McPherson avenue. Such is the contract of carriage set forth in the petition and that relied upon at the trial by plaintiff. However, defendant's chauffeur says no such instructions were given; that, on the contrary, the transportation was engaged to "some good saloon" over about Delmar avenue, which was some four or five blocks distant from the point of starting. At any rate, the chauffeur transported plaintiff and his companion to Allen's saloon on the northeast corner of Delmar and Euclid avenues, only a few blocks from the starting point. Upon arriving there, plaintiff says the chauffeur stopped the cab, alighted therefrom and opened the door thereof, requesting payment of the cab fare, fifty cents. Plaintiff testifies that he insisted the chauffeur should complete the journey to 4261 Page avenue and from thence to 4222 McPherson avenue, when the fare would be fully paid. The chauffeur insisted the fare of fifty cents must be then paid and that he would not further proceed until it was. Thereupon, plaintiff offered the chauffeur either a ten or

Digitized by Google

twenty dollar bill, of the exact denomination he is not certain, and the chauffeur was unable to make the change. Because of this fact, plaintiff alighted from the cab and with the chauffeur entered Allen's saloon at the northeast corner of Delmar and Euclid avenues with a view of procuring change for the bill, paying the cab fare and proceeding on the journey. The hour of midnight had arrived and the saloon was being closed. Both the proprietor and the bartender declined to make change for plaintiff or to sell him a drink through which transaction the change might be procured. Thereupon plaintiff went out of the saloon and crossed the street with a view of procuring the change in Cicardi's saloon, on the opposite corner—that is, the northwest corner of Delmar and Euclid avenues. Defendant's chauffeur followed plaintiff from Allen's saloon across the street and, it is said, was insisting on the payment of the fare in the meantime. Just before plaintiff reached Cicardi's saloon and while he was yet in the street and about to step upon the sidewalk, the chauffeur assaulted plaintiff, leveling a blow upon the back of his head with such force as to render him unconscious. The damages sued for result from the injury thus received, and the relation of passenger and carrier is both counted upon in the petition and carried into the instructions throughout the case, as if defendant failed in its duty to protect plaintiff, its passenger, from the assault of its servant during the transit.

On the part of defendant, the chauffeur testifies that plaintiff took passage in the taxicab to be transported only from the corner of Euclid and McPherson avenues to "some good saloon" over about Delmar avenue and that he was so transported and discharged there at Allen's saloon; that, though he struck him thereafter, he did so because plaintiff was intoxicated and rude and repeatedly suggested that he had

Digitized by Google

never paid a taxicab fare in his life and did not intend to do so, and furthermore because plaintiff first assaulted him. The chauffeur says that, upon arriving at Allen's saloon, plaintiff and his companion alighted from the cab, and he immediately demanded the fare of fifty cents, but plaintiff parleyed with him about it, told him to collect it from O'Shea, saying, substantially, that he never had paid, and never would pay, a cab fare. In seeking to collect the fare, the chauffeur says he followed plaintiff into Allen's saloon and, when he applied for a drink, heard the bartender tell him, "Nothing doing," whereupon plaintiff and his companion departed and crossed the street to Cicardi's saloon. After having repeatedly demanded the fare, and its payment being as often declined or deferred, at least, as if plaintiff had no intention of paying it, and this too, with rude remarks on the part of plaintiff, the assault was made.

By the instructions given at the instance of plaintiff, the court authorized a verdict for him against defendant as if it is a common carrier of passengers and as if plaintiff was a passenger and within its care and protection at the time the assault was made. The court instructed that if plaintiff engaged one of defendant's taxicabs to convey him to a certain point of destination and defendant's chauffeur in charge of such taxicab, without sufficient cause or provocation therefor, in attempting to collect plaintiff's fare, assaulted and struck him, then a recovery might be had against defendant on account of such assault. This instruction proceeds as though the mere fact that plaintiff engaged the taxicab to transport him to a "certain point of destination," without naming it, not only created the relation of passenger and carrier between the parties so as to place plaintiff within its protection, but continued that relation even when plaintiff was assaulted by the chauffeur in the street, and it omits entirely to reckon with the testimony of

Digitized by Google

the chauffeur that he had transported plaintiff and discharged him at the end of his journey where he declined to pay the fare. Obviously this and other instructions for plaintiff which so treat with the facts in judgment inhere with error, for if plaintiff had no intention of paying the fare when he entered the cab, or thereafter, then the relation of passenger and carrier did not obtain at all between the parties. If the contract of carriage is as plaintiff asserts it to be—that is, from the corner of McPherson and Euclid avenues to 4261 Page avenue and from thence to 4222 McPherson avenue—then plaintiff was a passenger at the time he was assaulted, for the transportation was not nearly completed at Euclid and Delmar avenues where the cab was stopped, the controversy arose, and the assault made.

There can be no doubt that the passenger is entitled to proper and decorous treatment from the carrier and its servants during the course of transportation, and this involves an assurance that such servants in charge of the conveyance will neither assault nor insult him. [Elliott on Railroads (2 Ed.), Sec. 1592; Keen v. St. Louis, I. M. & S. R. Co., 129 Mo. App. 301, 108 S. W. 1125.] Therefore, if the chauffeur stopped the cab, as testified by plaintiff, during the transit and demanded the payment of fifty cents fare or a payment of fifty cents on the fare and plaintiff alighted therefrom, going into Allen's saloon and from thence toward Cicardi's saloon, with a view of obtaining the change to pay it, the relation of carrier and passenger obtained during that time. The mere fact that a passenger leaves the conveyance during the transit does not in and of itself terminate the relation of the parties, provided he does so for a proper purpose. Especially is this true when he takes his leave temporarily from the conveyance with the consent of the carrier's servant in charge. For instance, it is said that where the passenger leaves the convey-

Digitized by Google

ance for a temporary purpose only, the relation of passenger and carrier continues to protect him, provided his purpose in leaving the train is connected with his journey and he remains on the premises of the carrier. [See Elliott on Railroads (2 Ed.), Sec. 1592; Missouri, K. & T. R. Co. v. Overfield, 19 Tex. Civ. App. 440, 47 S. W. 684; Hrebrik v. Carr, 29 Fed. 298; Parsons v. New York, etc. R. Co., 113 N. Y. 355; 5 Am. & Eng. Ency. Law (2 Ed.), 499, 500.] In this view, it is said the relation of passenger and carrier continues to protect the passenger who temporarily leaves the conveyance for the purpose of sending a telegram pertaining to his private business, when such telegram is transmitted at the carrier's depot. [Clussman v. Long Island R. Co., 9 Hun. (N. Y.), 618; Dice v. Willamette Transportation, etc., Co., 8 Ore. 60.] So, it is proper enough for a passenger to leave the train for the purpose of procuring a meal, and the relation of carrier and passenger continues to protect him while on the premises of the carrier and about the conveyance for that purpose. [Dodge v. Boston, etc. Steamship Co., 148 Mass. 207; Jeffersonville, etc. R. Co. v. Riley, 39 Ind. 568. See, also, to the same effect Laub v. Chicago, B. & Q. R. Co., 118 Mo. App. 488, 94 S. W. 550.]

It appearing that, according to the testimony of plaintiff, he alighted from the cab only temporarily to procure change, which the chauffeur was unable to make, and compensate the carrier for the fare with a view of continuing the journey, it is clear enough that he should be regarded as within the care of the carrier during the time. Obviously he had neither completed the journey nor was he yet discharged by the carrier. This is true though plaintiff entered one saloon and failed to procure the change and was en route to another when assaulted, for it appears the chauffeur either accompanied or followed him with a view of collecting such fare, and this fact alone continues the

Digitized by Google

relation as if plaintiff were on the carrier's premises, for it is clear he was not discharged but remained in its care through the presence of the chauffeur who attended his movements.

Moreover, even though the contract of carriage is as defendant's chauffeur testified, which involved only the transportation to Allen's saloon, it would seem that the principle involved in the obligation of the carrier to protect its passengers from the assaults of its own servants finds a just application here. We say this because the necessity for the continued relation of carrier and passenger existed at the time the assault was made—that is, in and about the collection of the fare for the transportation. It is true that if plaintiff had no intention of paying his fare, another question arises. But assuming that he entered the cab in good faith, intending to pay, and that he was in company with the chauffeur, earnestly endeavoring to procure change for the bill to the end of compensating defendant for the carriage to the place at which he alighted, it would seem that he was entitled to the protection and care of the carrier against the assault of such chauffeur during all of that time, and this is true even though they had passed from the cab into one saloon and then crossed the street to another. In such circumstances, it appears that the necessity for further relations with the carrier's servant continued while plaintiff was thus seeking change to pay the fare and with a view of being finally discharged therefrom by the carrier, whose chauffeur accompanied him during the time. When the relation of passenger and carrier is established, the passenger surrenders himself into the care and custody of the carrier. This implies an obligation on the part of the carrier not only to transport the passenger to destination, if he properly deports himself, but to discharge him on arrival free from assault on the part of its servants, that is in the proper manner. The mere

Digitized by Google

stepping of the passenger from the vehicle into the street at the end of his journey is not enough to acquit this obligation, for the passenger is to be discharged and protected from assault by the servants while being discharged by the carrier. Even though the journey was ended, plaintiff was not discharged by the carrier at the time the assault was made upon him. [See Van Hoefen v. Columbia Taxicab Co., 179 Mo. App. 591, 162 S. W. 694 (decided today); Ormand v. Hayes, 60 Tex. 180; 6 Cyc. 541, 542; Gaynor v. Old Colony, etc. R. Co., 100 Mass. 208; Burnham v. Wabash, etc. R. Co., 91 Mich. 523-525; 5 Am. & Eng. Ency. Law (2 Ed.), 499.]

But though such be true, the record abounds with evidence tending to prove that, although plaintiff engaged the taxicab and was transported in it, the relation of passenger and carrier did not obtain at all. We say this in view of the fact, first, that it appears plaintiff actually paid no fare whatever. Moreover, it appears from the testimony of the chauffeur that he refused to pay and repeatedly stated he had never paid a cab fare in his life and did not intend to do so. The chauffeur says, too, plaintiff insisted that he should drive him around during the night without a charge therefor and that they would have a good time together, etc. It is entirely clear that this evidence tends to prove plaintiff did not intend to pay his fare at the time he entered the cab or at any time thereafter. The chauffeur denies that plaintiff was endeavoring to obtain change with a view of paying the fare, and says he was seeking to buy a drink only and this was refused to him by the proprietor of the saloon and the bartender. The rule is well established in this State to the effect that where one takes passage upon the conveyance of a common carrier with a purpose to "beat" his way and intending at the time not to pay the fare and thereafter refuses to do so, he is to be regarded as a mere trespasser and not entitled

Digitized by Google

to the protection which inheres in the relation of passenger and carrier. [Beck v. Quincy, O. & K. C. R. Co., 129 Mo. App. 7, 108 S. W. 132; Lillis v. St. Louis, etc. R. Co., 64 Mo. 464; Short v. St. Louis, etc. R. Co., 150 Mo. App. 359, 130 S. W. 488; Gates v. Quincy, etc. R. Co., 125 Mo. App. 334, 102 S. W. 50; see, also, 5 Am. & Eng. Ency. Law (2 Ed.), 496.] It is obvious that if plaintiff did not intend to pay his fare and continued to refuse to pay it, as the chauffeur testifies, then he was not a passenger at all and, therefore, not entitled to the care and protection which obtains in that relation and invoked here as a predicate for recovery. Though requested to instruct the jury on this feature of the case, the court declined to do so, and this of itself should occasion a reversal of the judgment, for, on the facts in the record, the proposition of law thus adverted to is highly important to defendant and should be given to the jury as a guide.

However, the instructions for plaintiff are erroneous for the reasons above pointed out in that they omitted as well to reckon with the feature of the case last referred to. The judgment should be reversed and the cause remanded. It is so ordered. *Allen, J.*, concurs. *Reynolds, P. J.*, not sitting.

INTERNATIONAL TEXT-BOOK COMPANY, Appellant, v. ADOLPH ANDERSON, Respondent.

St. Louis Court of Appeals, December 31, 1913.

1. **APPELLATE PRACTICE: Conclusiveness of Trial Court's Finding.** Where, in a case tried to the court without a jury, no instructions were given or requested, the judgment should be affirmed on appeal, if supported by any view of the evidence, as all presumptions and intendments go in aid of it.

2. **CONTRACTS: Validity of Assent: Ignorance of Provisions.** That a party who signed a contract to pay a certain amount

Digitized by Google

in installments for a course of instruction did not know that it required him to pay such sum, was no defense to an action for that amount, in the absence of fraud, accident, or mistake, although he was a foreigner and unable to read the English language, in which the contract was written, since a person competent to contract is conclusively presumed to know the contents of a contract he signs, which presumption is not rebutted by the fact that he did not read it, for, if he is able to read it, he must do so, and if not, it devolves upon him to have some one else read or explain it to him.

3. ———: ———. That a person who executed a contract for a course of instruction was told by his foreman in the factory where he worked that it was a good thing, was no defense to an action for the stipulated price of the course, where it did not appear that the foreman represented plaintiff or that the contract was secured as a result of duress imposed by the foreman.

4. ———: **Failure to Accept Services: Right of Recovery: Damages.** Where a contract for a course of instruction, to be paid for in installments, provided that the whole amount unpaid should be recoverable from defendant in event of default in the payments, and plaintiff performed part, and repeatedly offered to perform the balance, of the conditions imposed by the contract, but defendant refused to accept the same, plaintiff could recover the full price after all the installments were past due, although defendant had not received the full course of instruction.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

REVERSED AND REMANDED (*with directions*).

Hall & Dame for appellant; *David C. Harrington* of counsel.

(1) If a person cannot read the language in which a contract is written, it is as much his duty to procure some person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as would estop him from avoiding it on the ground that he was ignoarnt of its contents. 9 Cyc.

Digitized by Google

390; Stanley v. Gas Light Co., 63 Mo. App. 123; Tate v. Locke, 130 Mo. App. 273; Penn v. Brashear, 65 Mo. App. 24; Mueller v. Kelly, 116 Fed. 545; Railroad v. Belliwith, 83 Fed. 437. (2) The suit at bar is an action to collect a balance due on the amount respondent was to pay appellant, and not to enforce a penalty or liquidated damages. Elec. Co. v. Hat & Fur Co., 94 Mo. App. 543; Cash Register Co. v. Dehm, 139 Mich. 406; 2 Mechem on Sales, sec. 1415; White v. Solomon, 164 Mass. 516; Textbook Co. v. Martin, 117 N. W. 994; Ely v. Dumont, 186 N. Y. App. 552; Safe Co. v. Emanuel, 21 Abb. N. C. 181.

F. A. C. MacManus for respondent.

NORTONI, J.—This is a suit for the balance due on a written contract for a course of instruction. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

The balance due on the contract is only forty-six dollars, and the case originated before a justice of the peace but found its way by appeal to the circuit court.

It appears plaintiff is an incorporated company with its home office in the State of Pennsylvania, and engaged in the business of instruction by means of correspondence through the mails. Defendant is a native of Sweden, residing in St. Louis, and, at the time he entered into the contract with plaintiff, was engaged as a shoe worker in one of the factories here. While at his work in the shoe factory, he was approached by plaintiff's agent, who solicited him to contract for a course of instruction. At that time defendant was twenty-two years of age and had resided in this country about nine months. It appears he was endeavoring to learn the English language and could write his name and some other words therein. His foreman, Loftis, told him the proposed course of instruction was a good thing and to sign the contract

Digitized by Google

for it. Defendant signed the written contract whereby he bound himself to pay fifty-six dollars in installments of five dollars per month for the course in the several English branches therein named. At the same time he paid plaintiff's agent the first installment of five dollars and a month thereafter paid him a second installment in the same amount. The contract was signed by defendant on March 16th and received by plaintiff at its home office a few days thereafter. Immediately, and in due time, plaintiff transmitted to defendant, through the mail, some books for study and instructions how to proceed. Defendant went about the studies but it seems he did not care to pursue that in arithmetic and, therefore, on April thirtieth, or six weeks after signing the contract, wrote plaintiff as follows:

April 30, 1906.

Gentlemen:

I do not care to keep up my arithmetic any longer. What I want to learn most of all is reading, writing and spelling. It is very hard for me to write when I do not know the language. I will still continue to pay my monthly payments promptly, so kindly send my books on grammar.

Yours truly,
ADOLPH ANDERSON,
St. Louis, Mo.

Defendant says this letter was written for him by a friend at his instance and request and that he personally signed and mailed it to plaintiff. Answering this letter, plaintiff wrote defendant urging him to continue the course as marked out in the contract, but it seems defendant became dissatisfied and dropped it entirely. He refused to pay further installments on the contract and discontinued the studies, though plaintiff urged him to continue them and offered to perform all of the conditions of the contract on its part. As before said, the contract provides for the

Digitized by Google

payment of a total sum of fifty-six dollars in monthly installments of five dollars per month and plaintiff paid two of such installments. The contract provides furthermore that, "In case default be made in the payment of any one of said installments, or any part thereof, when due and payable, I hereby agree that the whole amount remaining unpaid shall thereupon, at your option, become due and payable." After the time stipulated for all of the payments had elapsed and defendant's refusal to pay, this suit was instituted by plaintiff for the balance due on the contract—that is, forty-six dollars.

A jury was waived and the case tried before the court. No instructions were given or refused and none were requested, and, of course, if the evidence supports the judgment of the court in any view, such judgment should be affirmed, for all presumptions and intendments are in aid of it. But if it appears from the admissions of defendant that he contracted and owes the debt and that it is unpaid, of course, the judgment may not be sustained. Though the answer pleads that the contract sued upon was procured through fraud, practiced on defendant by plaintiff, there is not a suggestion in the evidence to sustain this charge. No word is given in testimony to the effect that plaintiff's agent made any false representations to plaintiff or practiced any trick or artifice upon him whatever. The substance of defendant's testimony is to the effect that he was at work in the shoe factory when plaintiff's agent approached him and suggested that he take the course of instruction. Defendant testified that the agent "told me that that would teach me; . . . I thought it would be my teaching; that is what I understood." This he reiterates several times; so it is clear defendant knew it was a contract for instruction.

Defendant appears to be a bright and intelligent young man. He was twenty-two years of age at the

Digitized by Google

time and endeavoring to learn the English language. He had progressed along this line far enough that he could write his name and other English words and figures. Besides writing his name to the contract with his own hand, defendant wrote his address thereunder as follows: "Adolf Anderson, 1447 N. 12th St., St. Louis." He also wrote in the contract opposite the word "Occupation," the English words or term "Shoe Worker." He also wrote his age "22" in our numerals. He admits writing these words and figures in the contract but says this is all he knew how to write at the time. It appears from his own statements that he knew the contract was for instruction to teach him in the English language and that he was to pay five-dollar installments thereon. The following question and answer appear: "Q. You knew you were going to get a course of instructions? A. Yes, sir." Several other portions of his testimony are to the same effect. He paid the first installment at the time and paid the second a month later. But he says he did not know that he was to pay in all fifty-six dollars for the course of instruction. His testimony is, that he did not read the contract himself and no one read it to him, but, as before said, there is not even a suggstion that any misrepresentation touching the matter was made by anyone.

From the testimony of defendant it appears that he understood the contract well enough, except he did not know it required him to pay a total of fifty-six dollars, and he says he signed it because his foreman said it was "a good thing" and told him to sign it. Obviously this constitutes no defense to the suit, for in the absence of fraud, accident or mistake defendant is conclusively presumed to know the contents of the contract and if he could not read it himself it was his duty to have some one read it to him before signing it. The mere fact that Loftis, his foreman in the shoe factory, told him it was a "good thing" and to sign it

Digitized by Google

evinces nothing as against the rights of plaintiff here, for it does not appear that he was representing plaintiff in any respect or that the contract was secured as a result of duress imposed on the part of the foreman.

A person who is competent to contract is conclusively presumed to know the contents of the contract he signs and the fact that he does not read it does not rebut this presumption. It is only where fraud, accident or mistake intervenes that one may be relieved in such circumstances. In the absence of fraud, accident or mistake appearing, the law concludes the matter in accord with the terms of the writing the party has signed, for if he can read, he must do so and if not, then it devolves upon him to have another read or explain it for him. [See Penn v. Brashear, 65 Mo. App. 24; Shanly v. Laclede Gaslight Co., 63 Mo. App. 123.] Indeed, there are cases where, though it appears the signing of the contract has been induced by fraud, such fraud may be neutralized and overcome through the negligence of the party signing it if he can read and fails to avail himself of the means of knowledge at hand by reading the contract and ascertaining the truth with respect to the representations on which it is said he relied. [See Tait v. Locke, 130 Mo. App. 273, 109 S. W. 105.] But be this as it may, the defense relied upon here is that defendant did not know the contents of the contract in that it imposed an obligation on him to pay the full sum of fifty-six dollars, because he did not read it before signing, when no misrepresentation of fact whatever appears.

Stress is laid in defendant's testimony on the fact that he was a Swede, but nine months in this country, and not familiar with our language, save that he could read and write a few words, as appears on the contract and in his testimony. The fact that he was a foreigner and unable to read our language avails naught in the case if neither fraud, accident nor mistake appear, for the duty to read obtains in the alter-

Digitized by Google

native, that is that if he could read he must do so, and if not, he should have some one read or explain the contract to him. Not having done this, defendant is concluded here by his negligence and inattention. [See Muller v. Kelly, 116 Fed. 545, 9 Cyc. 390; Shanly v. Laclede Gaslight Co., 63 Mo. App. 123.]

It appears plaintiff performed and repeatedly offered to perform all of the conditions imposed by the contract on it and all of the installments were past due before the suit was instituted. The contract expressly provides that the whole amount remaining unpaid thereon shall be recoverable from defendant in event he defaulted in his payments. This being true, the fact that defendant has not received the full course of the instruction provided for in no wise impedes the right to recover the full contract price, for parties *sui juris* may make such agreements and assume such obligations touching matters of this character as they see fit to undertake. [See Missouri Edison Elect. Co. v. Steinberg Hat, etc., Co., 94 Mo. App. 543, 68 S. W. 383.] Indeed, it is said by a court of high authority and now accepted as the universal rule: "If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum." [See White v. Solomon, 164 Mass. 516, 42 N. E. R. 104, 30 L. R. A. 537. See, also, to the same effect, National Cash Register Co. v. Dehn, 139 Mich. 406; Marvin Safe Co. v. Emanuel, 21 Abbott (N. C.) (N. Y.), 181; International Textbook Co. v. Martin (Neb.), 117 N. W. 994; 2 Mechem on Sales, sec. 1415.] In such cases the contract is regarded as an entire one which vouchsafes the full consideration stipulated for in that the agreement to pay is unqualified and because of this the seller is not restricted to his action for damages as for the breach through the buyer's refusal to ac-

Digitized by Google

cept. On the contrary, he may sue for and recover the whole sum. [Authorities supra.]

It appearing that a cause of action is not only established but admitted by defendant in his testimony and that no valid defense whatever was made thereto, the judgment should be reversed and the cause remanded with directions to the trial court to enter judgment for plaintiff for the amount sued for. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

In Re WILLIAM H. HEFFRON et al.

St. Louis Court of Appeals, December 31, 1913.

1. **BOYCOTT: What Is.** A boycott involves the idea of conspiracy and unlawful confederation on the part of several persons to injure the business of another.

2. **INJUNCTIONS: Right to Enjoin Interference with Business: Conspiracy.** A number of persons who have conspired or confederated together in combination may be restrained from interfering with the business of another so as to entail a substantial injury upon him, as by persuading his patrons, against their will, or by violence or threats, from having beneficial business intercourse with him.

3. **CIRCUIT COURTS: Proceedings Presumed to be Regular.** The circuit court being a court of general jurisdiction proceeding according to the course of the common law, all necessary presumptions are usually indulged in favor of its proceedings, if it appears that the orders or judgments involved were entered or given in a case in which the court had jurisdiction of the subject-matter and of the parties.

4. **HABEAS CORPUS: Scope of Inquiry.** Although a *habeas corpus* proceeding is a collateral attack on the judgment under which a person is restrained of his liberty, it is nevertheless competent to inquire, in a hearing on the writ, not only concerning the jurisdiction of the court over the subject-matter and the person of the person committed, but to also inquire into the facts concerning the particular exercise of jurisdiction by virtue of which such person was committed.

Digitized by Google

5. ———: ———: **Commitment only Considered.** In a *habeas corpus* proceeding, the question of whether the trial court had jurisdiction to imprison the petitioner for contempt in violating an injunctive order must be determined from the commitment itself, which is required by Secs. 2472 and 3884, R. S. 1909, to set forth, and is conclusively presumed to set forth, the facts on which it rests.

6. **INJUNCTIONS: Violation: Civil or Criminal Contempt: Requisites of Commitment.** A contempt for violating an injunction restraining the contemnor from interfering with plaintiff's business, although falling within the category of civil contempts, for the purpose of classification, is regarded in the law as criminal in its nature, when considered under the requirements of the statutes concerning the judgment and process of commitment by which the contemnor is restrained of his liberty; and hence, in such a case, the finding, judgment and commitment are to be strictly construed in favor of the contemnor, and all of the facts essential to show that the court had jurisdiction of the subject-matter and of the person and had jurisdiction to make the order in the particular case must appear in the judgment and the commitment.

7. **HABEAS CORPUS: Proceedings Reviewable: Commitment for Contempt.** One imprisoned for contempt for violating an order which the court had no authority to make may be released on *habeas corpus*.

8. **INJUNCTIONS: Interference with Business: Congregating on Sidewalk.** An injunction restraining striking employees from, singly or in numbers, stationing themselves or congregating upon the sidewalk adjoining and in front of the employer's place of business for the purpose of distributing cards or circulars, or of addressing remarks concerning the employer or its business, to persons passing along the sidewalk, was beyond the power of the court, since it had no right to restrain the parties from so using the sidewalk, unless they did so with a view of interfering with the employer's business, its employees or patrons, through threats, violence, intimidation, or by persuading persons desiring to patronize the employer to desist therefrom against their will, or unless the free ingress to or egress from the employers premises' were thereby impeded.

9. **HIGHWAYS: Right to Congregate upon Sidewalks.** Persons have a right to congregate upon and use the sidewalks in a public street, in the absence of a nuisance appearing, as by continual trespass, provided they do no injury to, nor congregate with a view of injuring, the property or business of another.

Digitized by Google

10. **INJUNCTIONS: Highways: Interference with Use of Sidewalk: Right of Abutting Owner to Enjoin.** While an obstruction or interference with the free use of sidewalks is a public nuisance, an abutting proprietor cannot restrain such nuisance, unless he suffers damages peculiar to him, different in kind, and not merely in degree, from those sustained by other members of the public.

11. ———: ———: ———: ———. The proprietor or occupant of a building abutting on a street may enjoin others from so using the sidewalk as to prevent free ingress and egress to and from the building, since, although the obstruction of the street constitutes a public nuisance, it also involves a private nuisance inflicting a peculiar injury on him, different in kind, and not merely in degree, from that sustained by the members of the community at large.

12. ———: **Right to Enjoin Distribution of Circulars: Constitutional Law: Freedom of Speech.** It is not within the power of a court of equity to restrain one from distributing cards or circulars concerning the business of another, or of addressing remarks concerning his business to persons passing along the sidewalk, if nothing more appears, since the constitutional provision assuring the right of free speech implies that the right is to be enjoyed by every citizen, subject only to his liability in damages for its abuse.

13. ———: **Interference with Business: "Patrolling."** An injunction restraining striking employees, either singly or in numbers, from patrolling the sidewalk adjoining the employer's place of business was too vague and indefinite to be enforcible, since, while "patrolling" involves the idea of walking to and fro as a guard, it in and of itself implies nothing unlawful.

14. ———: ———: **Force: Intimidation, etc.** Striking employees were properly enjoined from preventing, or attempting to prevent, by force, violence, threats, menace or intimidation, persons from patronizing the employer's place of business and from compelling, or attempting to compel, by threats, intimidation, force or violence, other employees to refuse to perform their duties.

15. ———: **Violation: Contempt: Sufficiency of Commitment.** Where an injunction restrained striking employees from assaulting or exercising violence on any person patronizing the employer's place of business, or any of its employees, a judgment and commitment for contempt, stating that one of the defendants had committed an assault upon a person named

Digitized by Google

within a short time after he had left the employer's place of business, and that the assault was unprovoked and in violation of the injunction, without any finding that such person was a patron or employee of the employer, was insufficient to warrant the imprisonment of such defendant, under the rule that the commitment must bring the defendant strictly within the terms of the injunction and show that he violated it; the statement that it was a violation being a conclusion.

Habeas Corpus—Original Proceeding.

WRIT AWARDED.

Edward W. Foristel, John B. Dempsey, George H. Shields and *Leighton Shields* for petitioners.

Leahy, Saunders & Barth for respondent.

STATEMENT.—This is an original proceeding instituted in this court through suing out a writ of *habeas corpus*. There are three of the petitioners who invoke the writ, viz., William H. Heffron, George Ringler and Oscar Close. Though it does not fully appear, it is to be inferred that these petitioners, with a number of others, were defendants in an injunction suit instituted by the St. Louis Catering Company against Hubert C. Wade and others in the circuit court of the city of St. Louis with a view of restraining them from levying and pursuing a boycott against the plaintiff catering company and its business. However, a boycott involves the idea of a conspiracy and unlawful confederation on the part of several to injure the business of another, and nothing of that kind appears on the record before us, unless it is to be presumed that the circuit court gave judgment sustaining the injunction on that ground.

It is to be inferred from the record that the petitioners are waiters and members of a waiters' union, and it may be that they had a grievance against the catering company, but this does not fully appear from

Digitized by Google

the judgment and commitment under which they are restrained of their liberty. It appears the three petitioners, together with a number of others, were charged with contempt for having violated a restraining order against them. On a hearing of the charge of contempt, after notice, the court found a number of the defendants not guilty of the charge, but entered a judgment of contempt against the three petitioners and one Hooper. By this judgment a fine was assessed against each and they were committed to jail for its nonpayment. Hooper's fine was afterwards paid and he was, therefore, discharged. The three petitioners, Heffron, Ringler and Close, after having been confined in jail several days, sued out the writ of *habeas corpus* involved here. The jailer of the city of St. Louis, in making his return to the writ, exhibits the commitment, which purports to be a copy of the judgment under which the petitioners are confined in jail. Such commitment, revealing a certified copy of the judgment, is as follows:

"State of Missouri, } ss.
City of St. Louis. }

"To the Sheriff of the City of St. Louis, Greeting:

"Whereas on the tenth day of November, in the year of our Lord, nineteen hundred and thirteen, at our circuit court in the city of St. Louis and State of Missouri, before Honorable J. Hugo Grimm, one of the judges sitting in division No. 1 thereof, William H. Heffron, George Ringler, Thomas Hooper and Oscar Close were convicted of contempt of court as more fully appears from the judgment thereof and made a part of this commitment, entered in Record 270, at page 352, in words and figures as follows, to-wit:

Digitized by Google

" 'Monday, November 10, 1913.

" 'St. Louis Catering Company, a corporation,
v. 86496-A
" 'Hubert C. Wade, et al.

" 'Now at this day the citation for contempt heretofore issued in the above entitled cause against defendants Hubert C. Wade, Thomas Hooper, C. J. Griffin, George Ringler, John B. Carpenter, John T. Green, James Scully, William Heffron, James Furlong, Herman Ball, John Kroeger, Vincent Hagan, Oscar Close, Frank Bush, James Allen and Frank Murray, coming on to be heard, comes the plaintiff by its attorney, come also all of the respondents excepting respondents C. J. Griffin, John Kroeger and Frank Murray, by their respective attorneys, and submit this matter to the court upon the pleadings, the evidence and the proof adduced; and the court having heard and duly considered the same, and being fully advised in the premises, doth find that on September 12, 1913, an order to show cause and temporary restraining order was granted against defendants, returnable September 15, 1913, and that all of the defendants entered their appearance to said order to show cause and filed their joint return thereto; and that thereafter, to-wit, October 6, 1913, a temporary injunction was granted in the above cause, upon plaintiff's giving a bond in the sum of five thousand dollars, to be approved by the court or judge, restraining the defendants, their servants, agents, associates and representatives, and each of them, from either singly or in numbers stationing themselves or congregating upon the sidewalk adjoining and in front of plaintiff's place of business, the southeast corner of Sixth and St. Charles street, for the purpose of distributing cards or circulars containing statements concerning plaintiff or its business, or of addressing remarks concerning plaintiff or its business to persons passing along said sidewalk;

Digitized by Google

" 'From either singly or in numbers patrolling the sidewalks adjoining plaintiff's said place of business;

" 'From preventing or attempting by the use of force, violence, threats, menaces, or intimidations, any person from patronizing plaintiff's said place of business;

" 'From compelling or attempting to compel by threats, intimidations, or acts of force or violence, any of the employees of the plaintiff to refuse to or fail to perform their duties as such employees;

" 'That during the afternoon of said date the said bond was approved and filed;

" 'And doth further find that the respondents John T. Green, John B. Carpenter, James Scully, James Furlong, Herman Ball, John Kroeger, Vincent Hagan, C. L. Griffin, Hubert C. Wade, Frank Bush, and James Allen are not guilty of contempt of this court; and that the respondents William H. Heffron, George Ringler, Thomas Hooper and Oscar Close are guilty of contempt of this court, in violating the temporary injunction issued in this cause on the 6th day of October, 1913, in this, to-wit: That defendants George Ringler and Thomas Hooper, members of the joint executive board of Waiters' Union No. 20, caused certain men who were paid by said joint executive board, to do picket duty on the 7th day of October, 1913, in front of plaintiff's place of business at the southeast corner of Sixth and St. Charles street, and caused said men to patrol the sidewalks adjoining plaintiff's said place of buisness; that defendant William H. Heffron was captain and in charge of the pickets and superintended their action at plaintiff's said place of business, and paid them for their services out of the funds furnished by the joint executive board of the several unions co-operating in this controversy; that he knew these men were patrolling and did so wholly under his direction;

Digitized by Google

" 'That the defendant Oscar Close committed an assault upon one Frank Primm, within a short time after he had left plaintiff's St. Charles street front, and that the assault was unprovoked; all in violation of the temporary injunction issued as aforesaid.

" 'Wherefore, it is considered and adjudged by the court that William H. Heffron, for the acts aforesaid, is guilty of a contempt of this court and because thereof doth fine the said William H. Heffron the sum of twenty-five dollars and costs; said fine to be paid into the school fund; and that the defendants George Ringler, Thomas Hooper, and Oscar Close, for the acts aforesaid, are guilty of a contempt of this court, and because thereof doth fine each of said defendants the sum of ten dollars and costs, said fines to be paid into the school fund; and in default of the payment of said fines and costs said defendants be committed until the fines and costs are paid, or they be otherwise discharged by due course of law.

" 'The court doth further order and adjudge that respondents John T. Green, John B. Carpenter, James Scully, James Furlong, Herman Ball, John Kroeger, Vincent Hagan, C. J. Griffin, Hubert C. Wade, Frank Bush, and James Allen, stand discharged from the rule to show any cause why they should not be punished for contempt.'

"And whereas, the court did consider and adjudge that said William H. Heffron, for said contempt, be adjudged to pay into the school fund a fine of twenty-five dollars, and the defendants George Ringler, Thomas Hooper and Oscar Close, for said contempt, were each adjudged to pay into the school fund a fine of ten dollars, and all of said defendants were also adjudged to pay the costs of the proceeding in that behalf accrued, amounting to forty-four and 50/100 dollars.

"And whereas, on the 14th day of November, 1913, the defendants William H. Heffron, George

Digitized by Google

Ringler, Thomas Hooper and Oscar Close filed their joint and several motion for a new trial and rehearing of the judgment rendered against them for violation of the temporary injunction, which said joint and several motion as to defendants William H. Heffron, George Ringler and Oscar Close was withdrawn on the 21st day of November, 1913, and as to defendant Thomas Hooper was taken as submitted by the court, and thereafter on the 1st day of December, 1913, overruled by the court.

"You are now therefore commanded that of the goods and chattels, lands and tenements of the said William H. Heffron, George Ringler, Thomas Hooper and Oscar Close, in your city found, you cause to be made the aforesaid fines and costs; and for want of sufficient goods and chattels, lands and tenements whereon to levy and to make said fines and costs, you are hereby commanded to take the body of the said William H. Heffron into your custody and convey him to the jail of the city of St. Louis in the State of Missouri, the keeper whereof is hereby commanded to receive the said defendant William H. Heffron and him there keep until the said fine of twenty-five dollars, so assessed against him, and costs amounting to the sum of $11.125 dollars, shall have been paid by the said defendant William H. Heffron, or he be otherwise discharged by due course of law.

"You are further commanded to take the body of George Ringler into your custody and convey him to the jail of the city of St. Louis, in the State of Missouri, the keeper whereof is hereby commanded to receive the said defendant George Ringler and him there keep until the said fine of ten dollars, so assessed against him and costs, amounting to the sum of $11.125 dollars, shall have been paid by the said defendant George Ringler, or he be otherwise discharged by due course of law.

Digitized by Google

"You are further commanded to take the body of Thomas Hooper into your custody and convey him to the jail of the city of St. Louis in the State of Missouri, the keeper whereof is hereby commanded to receive the said defendant Thomas Hooper and him there keep until the said fine of ten dollars, so assessed against him and costs, amounting to the sum of $11.125 dollars, shall have been paid by the said defendant Thomas Hooper, or he be otherwise discharged by due course of law.

"You are further commanded to take the body of Oscar Close into your custody and convey him to the jail of the city of St. Louis in the State of Missouri, the keeper whereof is hereby commanded to receive the said defendant Oscar Close and him there keep until the said fine of ten dollars, so assessed against him, and costs, amounting to the sum of $11.125 dollars shall have been paid by the said defendant Oscar Close or he be otherwise discharged by due course of law.

"You are further commanded to make return of this writ within thirty days from date how you executed the same.

"Witness, Chas. R. Graves, Clerk of the said Court, with the seal thereof hereto affixed, at
(Seal) office, in the city of St. Louis, this 1st day of December, in the year of our Lord, nineteen hundred and thirteen.

(Signed) CHARLES R. GRAVES,
Clerk Circuit Court."

NORTONI, J. (after stating the facts).—There can be no doubt that a number of persons, confederated together in combination, as through a conspiracy, may be restrained by a court of equity from interfering with the business of another so as to entail a substantial injury upon him, as by persuading his patrons, against their will, or by means of violence or threats

Digitized by Google

preventing them from having beneficial business intercourse with the person against which the unlawful conspiracy is directed. [See Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997; Clarkson v. Laiblan, 178 Mo. App. 708, 161 S. W. 660.] It is, therefore, urged that the petitioners should be remanded here and the writ denied, for the reason we must presume the court found that they had conspired to injure the business of the St. Louis Catering Company and issued the injunction on that ground. It is true the circuit court is a court of general jurisdiction which proceeds according to the course of the common law, and it is true, too, that all necessary presumptions are usually indulged in favor of the proceedings of such a court, if it appears the orders or judgments involved were entered or given in a case over which the court had jurisdiction of the subject-matter and the person of the parties.

There can be no doubt that the circuit court possesses jurisdiction of the subject-matter when the case is one in equity involving injunctive relief against an unlawful conspiracy, such as a boycott, and it is true, too, that these petitioners were parties defendant to a suit in equity in which the St. Louis Catering Company was plaintiff and injunctive relief was sought to restrain them from interfering with the plaintiff's business, as by prosecuting a boycott against it. But because a court is possessed of jurisdiction over the subject-matter—that is, cases of the general class of actions—and the person, is no reason why it should transcend its powers and enjoin something which may not be inhibited by the law. If a conspiracy be found, or even conceded, it is obvious the court is without power to enjoin the conspirators, on that ground alone, from merely walking along the street or conversing with others, unless the restraining order connects such acts with the unlawful conspiracy and forbids it in furtherance thereof. In this view, the rule of decision is

Digitized by Google

declared that, though a *habeas corpus* be a collateral attack on the judgment, it is nevertheless competent to inquire thereon, not alone as to the jurisdiction of the court committing the prisoner over the subject-matter and his person, but to inquire as well as to the jurisdiction to commit as for the specific offense charged—that is, inquire into the facts concerning the particular exercise of jurisdiction by which the petitioner is restrained of his liberty. [See Ex parte Creasy, 243 Mo. 679, 148 S. W. 914.]

The inquiry touching this matter is to be had in the instant case by reviewing the commitment, which contains a copy of the judgment of conviction and is conclusively presumed to set forth the facts on which it must rest. We say the commitment is conclusively presumed to set forth the facts on which the judgment of contempt is predicated, for the reason that our statute requires the facts and circumstances to be fully stated and for the reason, too, that the offense of contempt is criminal in its nature. The statute pertaining to *habeas corpus* (Sec. 2472, R. S. 1909) directs the court to remand the petitioner when he is restrained of his liberty "for any contempt, specially and plainly charged in the commitment, by some court, officer or body, having authority to commit for a contempt so charged." This implies that the contempt for which the prisoner is withheld is to be pointedly charged and set forth in the commitment.

But this is not the only statutory provision touching the matter in judgment here, for another section is to be found as parcel of the provisions on contempt. Section 3884, Revised Statutes 1909, touching commitment for contempt, provides, "Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstances of his offense shall be set forth in the order or warrant of commitment." It is true the contempt involved here falls within the category of civil contempts, for the pun-

Digitized by Google

ishment is inflicted because of the alleged violation of an injunction granted in aid of the St. Louis Catering Company and in furtherance of its rights established by the decree. [See State ex rel. v. Bland, 189 Mo. 197, 88 S. W. 28.] But though such be true, the statute last quoted obtains as a rule of decision in such cases as well as in others, for it requires that "Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstances of his offense shall be set forth in the order or warrant of commitment." [Sec. 3884, R. S. 1909.] Contempts of the character of this one are provided for in the chapter referred to in the section last quoted, as will appear by reference to sections 3881, 3882, Revised Statutes 1909. Section 3881 authorizes the court to punish, as for criminal contempt, persons guilty of willful disobedience of any order lawfully issued or made by the court. Such is the case here, for the petitioners were convicted of contempt in that they willfully disobeyed the restraining order theretofore issued. Such contempts, even though falling within the category of civil contempts, for purpose of classification, are regarded in the law as criminal in their nature when considered under the requirements of these statutes concerning the judgment and process of commitment by which the person charged is restrained of his liberty. Therefore, the finding, the judgment and the commitment of the court are strictly construed in favor of the accused. In other words, nothing is to be inferred in favor of the restraint of liberty, and presumptions and intendments will not be indulged in in order to aid it. All of the facts essential to show that the court had jurisdiction of the subject-matter, of the person, and to make the order in the particular case must appear in the judgment and the commitment by which the citizen is restrained, and this is true because it is said the statute requires it. [See Ex Parte Creasy, 243 Mo. 679, 148 S. W. 914; In re Shull,

Digitized by Google

221 Mo. 623, 121 S. W. 10; Church on Habeas Corpus (2 Ed.), 316.]

Viewed under this rule of decision, the judgment of conviction and the commitment issued thereon are wholly insufficient to justify the punishment as for contempt of the three petitioners for the reason, first, that the court was without power to make the broad and sweeping order for a violation of which petitioners Heffron and Ringler are convicted; and, second, because it does not appear from the finding of facts, that petitioner Close violated the terms of the order on which he was convicted.

There can be no doubt of the proposition that one imprisoned as for contempt for violating an order which the court possessed no authority to make, may be released on *habeas corpus*. [See Ex Parte Craig, 130 Mo. 590, 32 S. W. 1121; Ex Parte Arnold, 128 Mo. 256, 30 S. W. 768, 1036; In re Ayers, 123 U. S. 443; 15 Am. & Eng. Ency. Law (2 Ed.), 178.]

Looking to the commitment and judgment, it appears that on October 6th a temporary injunction was granted, restraining the petitioners and others who were defendants in the injunction suit, "their servants, agents, associates and representatives, and each of them, from either singly or in numbers stationing themselves or congregating upon the sidewalk adjoining and in front of plaintiff's place of business, the southeast corner of Sixth and St. Charles street, for the purpose of distributing cards or circulars containing statements concerning plaintiff [that is, the St. Louis Catering Company] or its business, or of addressing remarks concerning plaintiff or its business to persons passing along the sidewalk; from either singly or in numbers patrolling the sidewalk adjoining plaintiff's said place of business; from preventing or attempting by the use of force, violence, threats, menaces or intimidations, any person from patronizing plaintiff's said place of business; from compelling

Digitized by Google

or attempting to compel by threats, intimidations, any person from patronizing plaintiff's said place of business; from compelling or attempting to compel by threats, intimidations or acts of force or violence, any of the employees of the plaintiff to refuse to or fail to perform their duties as such employees."

Obviously so much of this injunction as merely restrains defendants, singly or in numbers, from stationing themselves or congregating upon the sidewalk adjoining and in front of plaintiff's business for the purpose of distributing cards or circulars concerning plaintiff or its business, or of addressing remarks concerning plaintiff or its business, to persons along the sidewalk avails nothing. The court was without power to restrain the parties from thus using the sidewalk, unless they did so with a view of interfering with plaintiff's business, its employees or patrons through threats, violence, intimidation, or by persuading persons desiring to patronize it or causing them to desist therefrom against their will, except to restrain the free ingress and egress about plaintiff's premises as a private nuisance through continual trespass. Persons have a right to congregate upon and use the sidewalks in a public street, in the absence of a nuisance appearing, as by continual trespass, provided they do not injure, or do so with a view of injuring, the property or business of another.

Here the injunction restrains the petitioners from, singly or in numbers, stationing themselves or congregating upon the sidewalk adjoining and in front of plaintiff's place of business, without regard whatever to their conduct and as if any such congregating or standing violated plaintiff's property rights. It in no sense is restrictive of a use of the sidewalk that is unlawful, for it is not directed against the use of the sidewalk by the petitioners with a view of interfering with plaintiff's business, its employees or patrons, through threats, violence, intimidation, or by persuad-

Digitized by Google

ing persons desiring to patronize it, or causing them to desist therefrom, against their will, or by impeding the free access, that is, ingress to and egress from plaintiff's premises. If the injunction proceeds on the theory that it was competent to restrain the petitioners from interfering with the free ingress and egress to plaintiff's premises, then it should have reckoned with that matter and inhibited such conduct as would entail that result.

There can be no doubt that one and all may use the sidewalks for lawful purposes, and it is certain that an obstruction or interference with such free use operates a public nuisance. But though such be true, a private person, such as an abutting proprietor, is without remedy to restrain such public nuisance unless he suffer damages peculiar to him which are different in kind, and not merely in degree, from those sustained by other members of the public. In such cases, and such cases alone, is redress afforded to the private individual, either in law or equity, on the ground of public nuisance. [See Rude v. City of St. Louis, 93 Mo. 408, 6 S. W. 257; Fairchild v. City of St. Louis, 97 Mo. 85, 11 S. W. 60; Bailey v. Culver, 84 Mo. 531; Patton v. Forgey, 171 Mo. App. 1, 153 S. W. 575.] But there can be no doubt that an adjoining proprietor or occupant of the adjacent building possesses such a property right in the sidewalk in front of his premises as authorizes him to enjoin others from so using it as to prevent the free ingress and egress to and from the property, for though such use may constitute a public nuisance, it obviously entails a private nuisance as well and inflicts a peculiar injury upon him, different in kind, and not merely in degree, from that sustained by the members of the community at large. Even though a public nuisance does not appear, a private nuisance may be entailed, for it is clear that the right of an abutting owner, or one occupying such premises, to access to and from the street is a private right in

Digitized by Google

the sense that it is something different from the right which the members of the public have to use the street for public purposes. Conformably to this distinction and in part based upon it, a person owning or in possession of premises abutting on the street whose right of access to the same is unreasonably or unlawfully obstructed may redress the wrong either at law or in equity. [See Dillon, Municipal Corporations (3 Ed.), sec. 730; Schopp v. City of St. Louis, 117 Mo. 131, 22 S. W. 898; Rude v. City of St. Louis, 93 Mo. 408, 414, 6 S. W. 257; Cooley, Torts (3 Ed.), 736-738.]

In accord with this principle, Mr. Eddy, in his work on Combinations (3 Ed.), sec. 1034, thus succinctly states the law on the subject:

"The owner or occupant of a house, store, mill or factory, or any building or piece of property legitimately occupied and used by him, has a right of property in the streets adjacent thereto and used as approaches to his premises. He has the right of free and uninterrupted ingress and egress, and all parties using the streets must use them subject to this right of the abutting property owner. Anyone who violates this right of the property owner to the use of the streets that are appurtenant to his property by interferering with or impairing in any manner his free ingress and egress is liable for all damages occasioned by such interference, and the property owner may also abate such interference as a private nuisance by injunction.

"It is as much a nuisance to block up the street and impair the right of the property owner to ingress and egress by the continual presence of bodies of men as it would be to build barricades and embankments in the street.

"This right of the abutting property owner to an unobstructed access to his property over the streets and highways is not inconsistent with the right of striking employees to use the same streets and highways for the

Digitized by Google

lawful conduct and the maintenance of their strike by intercepting anyone going to work for the parties, and peaceful persuasion or argument against such parties taking the places of the striking employees.

"It is the right of every workingman to pass freely through the streets and highways to the place of his employment. This right is guaranteed by the law of every free country, wherever the right to work as one pleases and to contract for labor as one chooses is permitted by law; it is a part of the liberty which every man enjoys in this country as his birthright."

See, also, American Steel & Wire Co. v. Wire Drawers, etc., 90 Fed. 608.

While it was competent for the court to enjoin the defendants from congregating and stationing themselves upon the sidewalk in front of the premises of the catering company so as to interfere with the free ingress and egress from its place of business, no such inhibition is to be found in the order, but instead it proceeds in broad and sweeping language as though any congregation or standing upon the sidewalk by them was unlawful. In this the injunction exceeded the power of the court in that behalf, unless such conduct is to be prohibited on other grounds.

In further discussing the right of members of labor unions to assemble in the street, Mr. Eddy, in his work on Combinations, sec. 536, says:

"It is unlawful for the employees who are out on a strike to patrol the streets adjacent to employers' premises both day and night, and to keep within call at all times a large number of men for the nominal purpose of dissuading other workmen from taking the place of the striking employees, where it is clear from the circumstances that the patrolling was for the purpose of intimidating workmen seeking to enter the premises."

It therefore appears that this branch of the law on the subject requires the elements of force, threats,

Digitized by Google

intimidation and matter of that character to render the conduct unlawful. The injunction here—that is, the portion now under consideration—does not relate to force, violence, or intimidation, and it therefore exceeds the power of the court concerning the subject-matter. Neither is it within the power of a court of equity to restrain one from distributing cards or circulars concerning the business of another or of addressing remarks concerning one's business to persons passing along the sidewalk, if nothing more appears. The point has been expressly decided by our Supreme Court in Marx & Haas, etc., Co. v. Watson, 168 Mo. 133, 67 S. W. 391. The theory of that case is that injunction will not lie to restrain such distribution of cards and circulars and having conversation, because of our constitutional provision assuring the right of free speech. It is said that, though such conduct may entail an actionable injury at law upon the offender, for which he may be required to answer, the injunctive relief of a court of equity may not be invoked to prevent it, for the Constitution essentially implies the right is to be enjoyed by every citizen, subject only to his liability to respond in damages on that account for its abuse. On the same theory, and in the same view, this court has heretofore declared that an injunction may not be awarded against the publication of a libel, though an action in damages for the wrong will lie thereafter. [See Life Ass'n, etc., v. Boogher, 3 Mo. App. 173.]

It is urged that the case of Marx & Haas, etc., Co. v. Watson, 168 Mo. 133, 67 S. W. 391, is essentially overruled by the more recent one of Lohse Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, but to the extent above stated, the two are not inconsistent. Indeed, the Supreme Court so said in the latter case, as will appear by consulting the opinion. It is true, when the facts of the Marx & Haas case are thoughtfully considered, the judgment of the court seems to be incon-

Digitized by Google

sistent with the later one of Lohse Door Co. v. Fuelle, as the element of conspiracy appeared in both, and in the Marx & Haas case there were other facts present which it would seem authorized injunctive relief, wholly aside from the publication of the circular, on other and independent grounds. But be this as it may, the Supreme Court, as it appears, paid no heed to such other facts and treated the matter in that case solely as an attempt to enjoin the publication of a boycott only and declared that equity would afford no relief in such cases because of the constitutional right of free speech. In and from the report of the later case of Lohse Door Co. v. Fuelle, it is to be inferred the Supreme Court took notice of this, for it points out in the opinion that the only question "discussed" in the Marx & Haas case was that concerning the power of a court of equity to enjoin the "publication" of a boycott and in this view says the two cases are not inconsistent.

It is certainly true, under the authorities above cited, that the court is without power to enjoin the distribution of "cards or circulars containing statements concerning plaintiff or its business or of addressing remarks concerning plaintiff or its business to persons passing along said sidewalk," unless it appears that such cards, circulars and remarks concerning plaintiff's business were detrimental in character and used to injure it, and, even then, we decline to say that they, standing alone, could be enjoined, for the question is not made in the case. No such limitation is prescribed in the injunction, and in any view it exceeds the power of the court in that behalf for this reason. [See, too, Iron Molders' Uuion v. Allis-Chalmers Co., 166 Fed. 45-50.]

So much of the injunction as purports to enjoin the petitioners, "either singly or in numbers," from patrolling the sidewalk adjoining plaintiff's business avails nothing, for it does not appear what the court

Digitized by Google

intended thereby. This is vague and indefinite. The word "patrolling" involves the idea of one walking to and fro as a guard, but in and of itself implies nothing unlawful. It was certainly competent for the court to enjoin patrolling against patrons or prospective patrons of plaintiff's business from entering there or for the purpose of interfering with its employees. It was competent, too, for the court to enjoin such patrolling as might interfere with the free use of the sidewalk to afford ingress and egress to plaintiff's premises or such as should be accompaned with threats, intimidation, violence or conduct that should annoy and deter plaintiff's patrons or employees, but nothing of this kind is enjoined. The word "patrolling" in and of itself implies nothing unlawful, and the act may therefore not be forbidden, except as it is attended by the conduct of the patrol or the circumstances of the situation introducing an unlawful element. In this connection see City of St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30; Beaton v. Tarrant, 102 Ill. App. 124, 129; Jones v. Van Winkle, G. & M. Works (Ga.), 17 L. R. A. (N. S.) 848.

So much of the injunction as inhibits the defendants from preventing, or attempting, by the use of force, violence, threats, menaces or intimidation, to prevent any person from patronizing plaintiff's place of business is certainly valid and within the power of the court. So, too, is that portion of the order which forbids petitioners from compelling or attempting to compel, by threats, intimidation or acts of force or violence, any of the employees of plaintiff to fail to perform their duties as such employees. [See Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106.] But it does not appear from the finding of facts set forth in the judgment of contempt and the commitment that this portion of the order was violated by the petitioners. The finding of facts goes to the effect that George Ringler, along with others, was a

Digitized by Google

member of the joint executive board of Waiters' Union No. 20 and, as such, caused certain men who were paid by such joint executive board to do picket duty on the 7th day of October, 1913, in front of plaintiff's place of business at the southeast corner of Sixth and St. Charles streets, and caused said men to patrol the sidewalk adjoining plaintiff's said place of business; that petitioner William H. Heffron was captain and in charge of the pickets and superintended their action at plaintiff's said place of business and paid them for their services out of the funds furnished by the joint executive board of the several unions co-operating in this controversy; that he knew these men were patrolling and did so wholly under his direction. For this alone petitioners Ringler and Heffron were found guilty of contempt, without any finding that such picketing or patrolling, for which they were responsible, was detrimental to the business of the St. Louis Catering Company, that it was designed for that purpose or that it tended to impair its trade or impede its patrons or interfere with its employees, or that it was pursued with a view to impair the beneficial intercourse of other persons with the catering company, or that such patrolling or picketing involved any sort of threats, intimidation or violence against the catering company, its patrons, employees, or anybody else, for that matter. Moreover, there is no finding that such patrolling or picketing amounted to a nuisance or operated to impair the free ingress and egress to plaintiff's premises or even constituted a trespass of any kind against its rights.

Obviously this finding of fact against the two petitioners is insufficient to sustain their conviction as for contempt in violating the injunction, even though the injunction were comprehensive enough, and we have pointed out its insufficiency above. As before said, patrolling in and of itself, unaccompanied by other elements which render it obnoxious, is not un-

Digitized by Google

lawful. It has been expressly decided by the Supreme Court that the mere fact of picketing implies nothing unlawful. In that case the picket stood as a "picket" for hours on different days on a public street of the city, performing a duty which, as explained by the court, consisted in requesting men, with due decorum, not to take the place of strikers. This, in and of itself, the Supreme Court declared was not an unlawful use of the sidewalk. [See St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30.] That such is the accepted law on the subject we believe to be well established.

The Supreme Court of Indiana, in the case of Karges Furniture Co. v. Amalgamated, etc., Union, 165 Ind. 421, declared picketing in and of itself to be entirely lawful. The court said: "Whether picketing is lawful or unlawful, depends in each particular case upon the conduct of the pickets themselves." In Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, the United States Circuit Court of Appeals for the Seventh Circuit asserted the same doctrine and modified the decree restraining "picketing" by adding such words as were essential to render the act obnoxious, the words so added being "in a threatening or intimidating manner." [See, also, to the same effect Mills v. U. S. Printing Co., 99 App. Div. N. Y. 605; Everett Waddey v. R. T. Union, 105 Va. 188; Jones v. Van Winkle G. & M. Works (Ga.), 17 L. R. A. (N. S.), 848; Perkins, Campbell & Co. v. Rogg, 28 Weekly L. Bull. 32.]

So, it appears that though these petitioners were found to have been engaged in patrolling and picketing, these words in and of themselves imply nothing unlawful, and there is no finding that, in pursuing the patrolling and picketing they interfered with the free access as by ingress and egress to the premises of the catering company or threatened, intimidated, or coerced either plaintiff, any of its officers, employees or patrons, or in any wise conducted themselves in a manner obnoxious to the law.

Digitized by Google

It appears, from the judgment and commitment, that the petitioner Oscar Close committed an assault upon one Frank Primm within a short time after he had left plaintiff's said place of business and at a point somewhere east of plaintiff's St. Charles street front, and that the assault was unprovoked, all in violation of the temporary injunction issued as aforesaid. The words, "The assault was unprovoked, all in violation of the temporary injunction issued as aforesaid" are to be treated as a conclusion, for that the facts concerning the assault and whether the assault was within the terms of the injunction are not set forth at all. The injunction forbids the petitioners from exercising violence or assaulting any person patronizing plaintiff's said place of business or any of plaintiff's employees. If Primm, whom the court finds was assaulted by the petitioner Close, was either a patron of the catering company or one of its employees, the facts should have been so found by the court and stated in the judgment convicting him, for no intendments or implications may be invoked in aid of it. In other words, under the strict rule which obtains in contempt cases, as above pointed out, the finding and judgment must bring the party strictly within the terms of the injunction and show that he violated it. Nothing may be inferred. It may be that Close committed an unprovoked assault upon Primm, on the sidewalk near plaintiff's place of business for which Close would be answerable under the criminal laws of the State or under the ordinance of the city, but this alone is not sufficient to render him subject to imprisonment as for contempt for violating an order of the court, which restrains such conduct only when directed against a patron or employee of the catering company. The mere fact that Primm had recently come out of the catering company's place of business is not sufficient, under the strict rule which obtains, to sustain the conviction for contempt because of an assault upon him,

Digitized by Google

for we cannot infer, and it is not implied, that Primm was either a patron or an employee of the catering company. Such inferences and intendments are not allowed when persons are restrained of their liberty as for contempt of court, according to the decision of the Supreme Court in In re Shull, 221 Mo. 623, 121 S. W. 10 and Ex Parte Creasy, 243 Mo. 679, 148 S. W. 914.

It is clear that both the judgment of contempt and the commitment thereon are insufficient to justify the conviction and imprisonment of the petitioners and they should, therefore, be discharged. It is so ordered. *Reynolds, P. J.,* and *Allen, J.,* concur.

JOHN BOEHM, Respondent, v. GENERAL ELECTRIC COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 4, 1913. Opinion Filed December 31, 1913.

1. **NEGLIGENCE: Injury from Fall of Heavy Object: Contributory Negligence: Knowledge of Danger.** In an action for personal injuries sustained by plaintiff, caused by a heavy mass of iron, which was being hoisted by defendant, falling over against a scaffold on which plaintiff was walking, precipitating him into a pit, evidence *held* to show that there was nothing to warn plaintiff that it was unsafe for him to pass over the scaffold, near which the iron was being hoisted.

2. **MASTER AND SERVANT: Contributory Negligence: Choosing Unsafe Manner of Doing Work.** Although a servant, of his own free will, chooses an unsafe manner of doing his work or using the master's appliances, when other and safer ways could have been employed, he may still recover for injuries sustained from such use, unless the way he chose was so dangerous that an ordinarily prudent man would not have chosen it.

3. **NEGLIGENCE: Contributory Negligence: Presumptions.** One who was working in a building in which defendant (a contractor) was moving a heavy mass of iron had the right to presume that defendant would exercise the degree of care

Digitized by Google

required of persons handling heavy objects near where others are working.

4. ———: **Injury from Fall of Heavy Object: Sufficiency of Evidence.** In an action for personal injuries sustained by plaintiff, caused by a heavy mass of iron, which was being hoisted by defendant, falling over against a scaffold on which plaintiff was walking, precipitating him into a pit, where it was shown that an eyebolt in the iron, to which the hoisting cable was attached, broke, evidence *held* to sustain a finding that defendant was negligent in attaching the cable to the eyebolt without testing it to determine whether it would bear the strain.

5. **ACTION: Joint or Several Recovery.** Where the petition charges a joint tort against several defendants, a recovery may be had against one defendant only, or against all.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

AFFIRMED.

Dawson & Garvin for appellant.

(1) No negligence of defendants directly causing plaintiff's injury was shown, and the demurrer to the evidence should have been sustained as to both defendants at the close of plaintiff's case. Stanley v. United Ry. Co., 114 Mo. 606; Feary v. Railroad, 162 Mo. 75; Bohn v. Railroad, 106 Mo. 429; Brands v. St. Louis Car Co., 213 Mo. 698; Patton v. Railroad, 179 Fed. 530; Frye v. Railroad, 200 Mo. 398; Bowen v. Railroad, 95 Mo. 274; Abbott v. Mining Co., 112 Mo. App. 550; Breen v. St. Louis Cooperage Co., 50 Mo. App. 202; Gibbons v. Steam Nav. Co., 175 Mass. 212; Baecker v. Railroad, 240 Mo. 507; Smith v. Bispham, 52 N. Y. Supr. Ct. 33. (a) The doctrine of *res ipsa loquitur* does not apply to a case like the one at bar. Gardner v. Railoard, 223 Mo. 389; Zachra v. Mfg. Co., 159 Mo. App. 96; Evans v. Railroad, 222 Mo. 435. (2) The demurrer to the evidence should have been sustained as to the defendant General Electric Com-

Digitized by Google

pany, who was not plaintiff's master or employer. Authorities cited to Point 1, supra. (a) The petition charges a joint tort and does not state facts sufficient to constitute a separate cause of action against this defendant. Otrich v. Railroad, 154 Mo. App. 430; DeDonato v. Morrison, 160 Mo. 581; Weist v. City of Phila., 200 Pa. 148. (3) In any case plaintiff's injury is the direct result of plaintiff's contributory neglifence in voluntarily leaving a safe place and unnecessarily and for his own convenience going on to the temporary scaffold with full knowledge of the situation—thereby assuming whatever risk there was of such an accident happening as did happen. King v. Railroad, 211 Mo. 1; Baecker v. Railroad, 240 Mo. 507; O'Brien v. Western Steel Co., 100 Mo. 182; Bohn v. Railroad, 106 Mo. 429; Kinney v. Corbin, 132 Pa. 347; Calvin v. Railroad, 162 Mass. 533; O'Hare v. O'Rourke Const. Co., 120 N. Y. Sup. 404; Ramona O. S. C. v. Tate, 12 Ind. 57; Burk v. Ed. Gen. Elec. Co., 89 How. 498; Smith v. Bispham, 52 N. Y. Supr. Ct. 33; Hamilton v. Railroad, 83 Ga. 346. (4) No instruction given on behalf of plaintiff limiting the case to specific acts of negligence alleged in the petition, but plaintiff's instructions authorized the jury to find for plaintiff on any ground whether stated in the petition or not. This is reversible error. Beave v. Transit Co., 212 Mo. 331. (5) The court's refusal to give instruction D 5 asked by defendant was further error for above reasons and also because it is the law. Beave v. Transit Co., supra; Bohn v. Railroad, 106 Mo. 429; Beebe v. Transit Co., 206 Mo. 419.

Granville Hogan and *Earl M. Pirkey* for respondent.

(1) A petition may allege the doing of negligent acts jointly by two or more defendants and a recovery had against where the proof establishes the connection

Digitized by Google

of but one defendant with the acts averred. Hutchinson v. Safety Gate Co., 247 Mo. 105; Winn v. Kansas City B. R. Co., 245 Mo. 412. A case may be reversed as to one defendant and affirmed as to another. Stotler v. Railroad Co., 200 Mo. 149. (2) A contractor and a subcontractor are respectively liable to their employees and to each other's employees where they have negligently injured them. Hutchinson v. Safety Gate Co., 247 Mo. 99; Clark v. Union Iron and Foundry Co., 234 Mo. 436. (3) Parties must so conduct themselves as not to injure others who are in pursuit of their lawful business. A person in conducting his work or business owes a duty of ordinary care to those lawfully at or about him. Young v. Waters Pierce Oil Company, 185 Mo. 666; Sykes v. Railroad, 178 Mo. 712; O'Keefe v. Railroad, 108 Mo. App. 177; The Asbury Park, 144 Fed. 553. (4) As a general rule a man is not required to look for danger when he has no cause to anticipate danger or when danger does not exist except it be caused by the negligence of another. Crawford v. Stockyards Company, 215 Mo. 414. A person in peril from the negligence of another is not required to adopt the safest and best course to avoid injury, but is only required to act with ordinary prudence. Hull v. Thomson Transfer Company, 135 Mo. App. 120. If there are two ways for a servant to do an act, one more dangerous than the other, both of which are furnished by the master with the intention that the employee may use either, he is not negligent in choosing the more hazardous course. Hutchinson v. Safety Gate Co., 247 Mo. 116. Even where a servant of his own free will chooses an unsafe way when a safer way is at hand, he can recover, unless the way he chose is so glaringly dangerous that no prudent person would have chosen it. Rhea v. Railroad, 171 Mo. App. 160; Railroad v. Thompson, 199 Fed. 395; American Car and Foundry Co. v. Ruckle, 200 Fed. 47. (5) The assignment that the verdict is against the weight of the evidence

Digitized by Google

is an admission that there is sufficient evidence to support the verdict. Crawford v. Stockyards Co., 215 Mo. 402. (6) Nondirection is not error. If plaintiff's instruction on the measure of damages is correct he was not required to ask other instructions. Morgan v. Mulhall, 214 Mo. 451; State v. Conway, 241 Mo. 284; Tate v. Railroad, 159 Mo. App. 481.

REYNOLDS, P. J.—This is an action by plaintiff, respondent here, against the Union Electric Light & Power Company and the General Electric Company, to recover damages for personal injuries alleged to have resulted from the joint tort of the defendants. The petition charges that on a day named plaintiff, then in the service of the Union Electric Light & Power Company, and while discharging the duties of his employment, was at work in a building belonging to the Union Electric Light & Power Company, in which building at the time of the accident the General Electric Company was installing certain machinery; that at the time of the accident both defendants were engaged in hauling and moving a heavy piece of machinery, known as an armature or field, from one part of the building to the other, by means of a crane, equipped with cables; that the cables were attached to an eyebolt in the field and that while the defendants were engaged in moving and handling this field they negligently caused and permitted it to incline and lean sidewise while the eyebolt was held as before mentioned, and negligently, etc., caused the crane, thimble, cables, hook and eyebolt to sustain so much of the weight of the field that undue force was exerted upon the eyebolt, and that because of this undue force, and because it was brittle, defective and insufficient to bear the weight of the field, and insufficient and not reasonably safe for the purpose for which the defendants were using it, the eyebolt broke; that by reason of this breaking of the eyebolt, the armature or field fell from its inclined to a horizontal po-

Digitized by Google

sition on the floor upon which it was located and that in falling it struck a scaffold on which plaintiff was then standing, thereby causing him to be thrown into a pit, to his hurt and injury. It is further charged that this eyebolt, at the time it broke and for a long time next prior thereto, was brittle, defective, insufficient and not reasonably safe to sustain the weight, and that the defendants knew, or by the exercise of ordinary care, could have known such was the fact, and of the danger to plaintiff arising from using it in the manner mentioned; that they had used the eyebolt in inclining this field before they caused the field to incline, yet thereafter they negligently caused the field to incline or lean as before stated and negligently used it without protection, or notice of any kind to plaintiff, and negligently failed to warn plaintiff of the danger, or of the defectiveness or insufficiency of the eyebolt, and thereby directly caused plaintiff to be injured as above set out. Judgment is demanded against both defendants in the sum of $20,000.

Defendants answered separately, the Union Electric Company by a general denial, the General Electric Company by a general denial followed by the averment that the scaffold mentioned in the petition was merely a temporary covering laid over a part of the top of the hole or pit in and about which plaintiff had been working; that there was a permanent stairway coming out of the hole or pit on to a permanent gallery or passageway with other permanent passageways or roads provided for the use of persons leaving the pit and passing through and out of the engine room, which the plaintiff might and should have used, but with notice and knowledge of the work that was being done in removing this field or armature and of the manner in which it was being done and of the place where it was being done and its proximity to the temporary covering or scaffold, negligently, voluntarily and unnecessarily left the permanent galleries or pas-

Digitized by Google

sage ways and negligently climbed over the rail of the gallery and got upon and attempted to use this scaffold or temporary covering over the hole or pit as a passageway, and negligently proceeded toward where the field or armature was being handled, and that if he had remained where he was, or used the permanent galleries he would have been in no danger of injury, and that whatever injury plaintiff may have sustained was the result of his own negligence and carelessness. A reply was filed to this.

There was a verdict and judgment in favor of the Union Electric Light & Power Company but against the General Electric Company, the latter in the sum of $2000. The plaintiff appealed from the judgment in favor of the Union Electric Company to the Supreme Court but afterwards dismissed that appeal. The General Electric Company, filing its motion for a new trial as well as one in arrest and excepting to all the adverse rulings and action of the court, duly perfected its appeal to this court.

The case has been argued and briefed very thoroughly by the respective counsel but its decision really lies in a very narrow compass.

It appears that plaintiff was in the employ of the Union Electric Light & Power Company in a building in St. Louis owned by that company. The General Electric Company was engaged in that building in lifting and loading upon a car a heavy piece of machinery called a field, or an armature, intending to remove it from the position it had been in. The field or armature was being hoisted by means of a crane and wire cables run through an eyebolt, which was set in the field. In loading it on the car the field was tilting over at an angle, so that the whole weight of this field, several tons, was thrown upon this eyebolt. The eyebolt broke off short at the eye, and the field, falling, struck the scaffold or boards upon which plaintiff was walking or standing at the time and threw him

Digitized by Google

down into a pit. Plaintiff sustained rather serious injuries. It appears that plaintiff was engaged in his usual occupation, a helper to a pipe fitter working about the plant, and in the course of his work was going from one part of the building to the other. He took this route over this platform or scaffold because it was a "short cut." It appears that there were permanent iron platforms and passageways, as stated in the answer of the General Electric Company, which plaintiff could have used, but it is in evidence that the temporary scaffold over this pit and which was covered with heavy planks or boards, had been in place there for about five or six weeks before the accident and was in common use by the men working there; that plaintiff had used it himself on several occasions, and that it was a short cut between the place at which plaintiff was working and the outlet of the building, to or from which he was walking. Plaintiff came up from the pit in which he had been working and stepped on this scaffold and started to walk across it. The field was then being lifted on to the car when, the eyebolt breaking, the weight of the field was thrown against the ends of the boards on the scaffold and the boards flying apart, plaintiff was thrown into the pit. He had been over this scaffold several times that day while the field was being handled; saw that it was being lifted, but apparently did not apprehend any danger either of its falling or, if falling, striking the platform of the scaffold. Nor did he hear any warning that there was any danger; heard no order to look out for it or to get away or under cover. Appellant introduced no testimony.

Reading the testimony with care, we find no evidence that plaintiff knew or had reason to believe that this way over this scaffold was dangerous, any more dangerous at that time than before. The fact that this heavy piece of machinery was being lifted near it was no notice of danger in itself; there was nothing about

Digitized by Google

it to indicate that it would fall, or, falling, that it would hit the scaffold or plaintiff. It was some feet away from it. Plaintiff was where he had a right to be and was not warned of any danger.

Counsel for appellant very strenuously argue that where there are two ways that a person can take, one safe and the other dangerous, if the wayfarer chooses to take the more dangerous one and is hurt, he cannot recover. That argument is of no force here. The evidence does not sustain the claim that plaintiff, having a safe and an unsafe way, chose the latter, knowing it was unsafe. There was nothing to warn him that the way he chose was unsafe. Nor is it correct to say that having two routes, the wayfarer in all cases selects the more dangerous one at his peril. That will depend on the facts in a given case.

In Rhea v. Missouri Pac. Ry. Co., 171 Mo. App. 160, l. c. 178, 156 S. W. 4, will be found a collection of authorities in support of the proposition that when a servant of his own free will chooses an unsafe manner of doing his work, or using his employer's appliances when other and safer ways are at hand, he may still recover for his injuries, unelss the way chosen was so dangerous that an ordinarily prudent man would not have chosen it. Another case in which the rule was invoked was that of Hodges v. Chambers, 171 Mo. App. 563, l. c. 570, 154 S. W. 429. There it is said that the plaintiff, "as a pedestrian, had as much right upon this driveway as did the defendant with his automobile, and the defendant owed to plaintiff the duty to exercise toward him, as a pedestrian upon this driveway, that degree of care which by our statute is imposed upon the owners or drivers of such vehicles." The same principle applies here in a measure. This plaintiff had a right to use this pathway. He had a right to presume that appellant would exercise that degree of care enjoined upon those engaged in such a work near

Digitized by Google

it that is required in handling heavy machinery in the vicinity of pasers-by.

There was nothing present to advise plaintiff that it was dangerous to take this passagewey. In the Hodges-Chambers case, supra, it is said, in answer to the claim that many cases hold that one cannot recover where he knowingly chooses a dangerous road or passageway when a safe one is at hand, that such cases do not apply for the reason that the driveway in question was a public highway and could only be said to have been dangerous when made so by the failure of the drivers of vehicles to exercise the care required of them by law. Although not quite analogous to the case before us, the principle announced in those cases is just as applicable to that at bar as to them, for the point is, that one must choose, knowing the danger. This plaintiff had a right to act upon the presumption that those who were moving this heavy piece of machinery would do so in a careful manner. The evidence almost without contradiction proved, certainly tended to prove, that the route plaintiff was following was one commonly used by the men working about this plant. It had never been found dangerous or unsafe for use by workmen passing from one part of the plant to another, and plaintiff had no reason to think, much less know, that it was dangerous. Moreover, if dangerous, it was made so by appellant. The only thing that made it dangerous upon this particular occasion was that at the time plaintiff was using it, this defendant, the General Electric Company, was handling a very heavy piece of machinery in close juxtaposition to it. It may be said to be dangeraus at all times for one to pass along a street, over or through which heavy bodies are being moved. That does not necessarily close the street to travel. The field was not on this passageway on which he was standing. How was he to suppose that even if it broke or fell, it would injure him? He was not going under it at the time, but did intend to

Digitized by Google

pass by it, as he had done before. He was near where it was being handled, but had a right to assume that defendant would do its work in a careful manner and that it had the means and appliances safely to handle this field or armature. Furthermore plaintiff had a right to assume that the armature itself was in such condition as to warrant defendant, the General Electric Company, in handling it in the manner and with the means by which at the time it was being handled. It cannot be charged against plaintiff that he had any reason to supose that there was any weakness in the field or that he was in imminent danger by reason of that weakness or from the manner it was being handled. So that there was nothing in the fact that the defendant was handling this heavy mass of iron or steel in the vicinity of this passageway to render the use of the passageway so obviously unsafe or dangerous as to require plaintiff to avoid it. Nor can we see how it can be said, as a matter of law or fact, that plaintiff, supposing he knew the machinery as then and there handled would, even if falling, fall in such a manner as to endanger him, standing on the platform several feet away from it. He was not called upon to presume that, falling, it would hit the planks upon this scaffold and throw him into the pit. As far as this point is concerned, we are unable to see how it can be charged that having a safe and an unsafe way of passage, this plaintiff, at his own risk, had knowingly chosen the dangerous one on that occasion.

Counsel for appellant cite us, among other cases, to Baecker v. Missouri Pacific Ry. Co., 240 Mo. 507, 144 S. W. 803, King v. Wabash R. R. Co., 211 Mo. 1, 109 S. W. 671; Hirsch v. Freund Bros. Bread Co., 150 Mo. App. 162, 129 S. W. 1060; and Maupin v. Miller, 164 Mo. App. 149, 148 S. W. 141. We find nothing in any of these cases that sustains that claim. The facts in the cases on which the rule so clearly announced

Digitized by Google

in the Hirsch case, supra, at page 174, rests are totally unlike those now before us.

We have stated that plaintiff had a right to rely upon appellant using at least reasonable care in handling this heavy weight near a way often used as a passage. He also had a right to presume that the armature and its eyebolt were reasonably safe for such handling; the eyebolt strong enough to bear the strain to which it was apt to be subjected.

That brings us to another proposition very earnestly argued by the learned counsel for appellant, namely, that there was no substantial evidence in the case upon which the jury were warranted in charging this appellant, the General Electric Company, with responsibility for the breakage of this eyebolt in the armature or field. We cannot agree to this. There was testimony from an expert in mechanics and on the proper and usual tests of the strength of materials, given in answer to a hypothetical question, that it was an easy matter to determine, before use, the tensile strength of any material and particularly of this eyebolt, the breaking of which caused the filed to fall. There is the further testimony of a witness, who was of the gang working about this place, that when this eyebolt broke, it was "a clean break," the eyebolt breaking off even; no fractures appeared, no hidden defects, that could be discovered by the eye on an inspection of it, such as fissures, cracks or blemishes. He further testified that the material of which this eyebolt was made was either wrought iron or "very common steel." The weight of this field, several tons, was thrown upon this eyebolt, at the end of which, as the name implies, there was a ring or an eye, through which the strands of the cable attached to the crane, by which the field was being moved, passed. When the field was titlted, as it was, its whole weight was upon this eye or ring of the eyebolt. The eyebolt gave way, snapped clean off at the eye, as we understand, possi-

Digitized by Google

bly at the surface of the field, under the weight, and the armature fell, and as the jury must have found, because of the weakness of the eyebolt.

The jury had a model of the premises as well as of this field before it, the model exhibiting the different parts being used by the witnesses in the course of their testimony, they pointing out the various places in the building, the position of the building, of the machinery, of the scaffold, and the position of plaintiff at the time of the accident. The jury must have seen and understood the situation very fully, much better than it is possible for us to do, and had the benefit of this testimony before it as to the exact situation at the time of the accident. They had evidence as to the eyebolt, of what made, how its strength could have been determined; of the strain to which it was subjected. They had a right to infer from the evidence that appellant, using it, could have and ought to have informed itself, before subjecting the eyebolt to the strain under which it was put on that occasion, that it would stand that strain. In brief, the jury had substantial evidence on which to determine that the eyebolt used on this occasion was not sufficient to sustain the strain placed upon it, and that this appellant should have known that. That finding was confirmed by the trial court. The doctrine *res ipsa loquitur* is not here invoked nor involved. But taken in connection with the testimony as to the material of which this eyebolt was composed, the fact that it broke as described and that it was within the power of appellant to have ascertained its tensile strength before using it, and it not appearing that any such test had been used, the jury had a right to infer that it was negligence on the part of this defendant to use it in the manner and for the purpose which it did, without making proper tests—that it failed to exercise reasonable care in providing a reasonably safe appliance.

Digitized by Google

The only remaining proposition earnestly argued by the learned counsel for appellant, is to the effect that the petition charges a joint tort and does not state facts sufficient to constitute a separate cause of action against this defendant. Otrich v. St. L., I. Mt. & S. Ry. Co., 154 Mo. App. 420, 134 S. W. 665, is cited in support of this proposition. The decision in that case does, in a measure, support this claim, but unfortunately for the contention of the learned counsel for appellant, that case, and on that very point, has been distinctly overruled by our Supreme Court in Hutchinson v. Safety Gate Co. et al., 247 Mo. 71, l. c. 110; 152 S. W. 52. Granting that defendants were charged as joint tort feasors, as is held in the Hutchinson case, l. c. 111, a recovery may be had against one only, or against all. In this view of the case, we do not consider it necessary to consider the other points presented.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

PATTON-WORSHAM DRUG COMPANY, Respondent, v. GODDARD GROCER COMPANY, Appellant.

St. Louis Court of Appeals. Submitted on Briefs December 1, 1913. Opinion Filed December 31, 1913.

1. **PRINCIPAL AND AGENT: Authority of Agent: Sufficiency of Evidence.** In an action for the price of goods sold and delivered to an agent of a branch house of defendant mercantile company, evidence *held* to sustain a finding that the agent had authority to order goods for defendant.

2. **APPELLATE PRACTICE: Binding Effect of Theory at Trial.** In an action for the price of goods sold and delivered to an agent of a branch house of defendant mercantile company, where there was evidence that the agent had authority to

Digitized by Google

order the goods and bind defendant for the price, and the court, at the request of defendant, charged that before plaintiff could recover, the jury must believe that the order was within the scope of the agency, or that defendant subsequently ratified the act of the agent, defendant was bound by an adverse verdict.

3. ———: **Conclusiveness of Verdict.** The weight of the evidence is for the jury, and a verdict sustained by evidence and approved by the trial court is conclusive, on appeal.

4. **TRIAL PRACTICE: Reopening Case: Appellate Practice: Review.** The trial court may, in its discretion, before acting on a demurrer to plaintiff's evidence, reopen the case, at the request of plaintiff, and permit the introduction of material and relevant evidence which should have been introduced before plaintiff rested, and its discretion in this regard will not be disturbed, on appeal, unless manifestly abused.

5. **PRINCIPAL AND AGENT: Authority of Agent: Evidence: Custom and Usage.** In an action for the price of goods sold and delivered to an agent of a branch house of defendant mercantile company, where the issue was whether the agent had authority to order the goods and bind defendant for the price, evidence that the purchase involved was such a large one that it was out of the ordinary line of business of an agent of the character of the one acting for defendant, was properly excluded, in the absence of evidence tending to show that plaintiff had knowledge of the custom, especially where there was testimony that defendant's vice-president had stated that the agent had authority to make the purchase in question.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow,* Judge.

AFFIRMED.

H. E. Sprague and *John B. Denvir, Jr.* for appellant.

(1) The reopening of the case after plaintiff had closed, to permit plaintiff to bring in additional evidence, was an abuse of judicial discretion, when the additional evidence sought to be introduced was not newly discovered and might equally well have been introduced before the close. Tierney v. Spiva, 76 Mo. 279; Mayor, Etc., v. Burns, 114 Mo. 426; Goodrich v.

Digitized by Google

Railway Co., 152 Mo. 222; Bank v. Brinkerhoff, 110 Mo. App. 429. (2) Evidence of defendant's having filed a claim with the railroad after this suit was filed, for the goods previously tendered to plaintiff and refused by it, was not material or relevant and should have been excluded. Story on Sales, secs. 408-9; Rubin v. Sturtevant, 81 Fed. 931; Jones v. Bloomgarden, 143 Mich. 336; Black v. Delbridge, Etc., Co., 51 N. W. 269. (3) Evidence offered by defendnat of the unusual and extraordinary size of the order for goods not regularly or ordinarily carried in the wholesale grocery business, was improperly excluded. Mechem on Agency, secs. 286, 287, 290; Steel on Agency, sec. 97; 31 Cyc. 1337; Thompson on Corporations (2 Ed.), sec. 1577; St. L. Gunning Adv. Co. v. Wanamaker & Brown, 115 Mo. App. 270; Murphy v. Bldg. Co., 155 Mo. App. 649; Alt v. Grosclose, 61 Mo. App. 409; Hackett v. Van Frank, 105 Mo. App. 384; Dellacella v. Harmonie Club, 34 Mo. App. 179. (4) Evidence offered by defendant of a general knowledge of the trade concerning defendant's method of buying goods solely through its St. Louis office, was improperly excluded. Story on Agency (2 Ed.), sec. 98; Sanborn v. Cole, 63 Vt. 590; White v. Fuller, 67 Barb. 267, 271; Sumner v. Stewart, 69 Pa. St. 321, 324.

Abbott & Edwards for respondent.

(1) Material testimony should not be excluded because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. Dozier v. Jerman, 30 Mo. 216; The City of DeSoto v. Brown, 44 Mo. App. 148; Roland v. Beshears, 54 Mo. App. 227; Pearson v. Gillett, 55 Mo. App. 312; Boxberger v. Kansas City, 68 Mo. App. 412; Wyrick v. Railway Co., 74 Mo. App. 406. (2) Evidence of defendant having filed a claim against the

Digitized by Google

Frisco Railroad for the value of the oxidine shipped by defendant to plaintiff and by plaintiff refused and sold by the railroad, was material under the pleadings and properly admitted. Plummer v. Knight, 156 Mo. App. 342; Clark & Skyles on Agency, pp. 323, 326; 31 Cyc. p. 1280; Meachem on Agency, p. 98. (3) The only objection lodged against the admission of testimony relating to the claim defendant filed against the railroad was, that the evidence was immaterial. Such an objection is practically equivalent to no objection at all. For this reason, also, the court committed no error in admitting the testimony. Roe v. Bank of Versailles, 167 Mo. 422; Bragg v. Met. Street Ry. Co., 192 Mo. 342; Dean v. Railroad, 199 Mo. 401. (4) The court did not err in declining to permit the buyer of proprietary remedies for Meyer Bros. Drug Co. to state whether or not, in his opinion, this was a large or small sale or even an extraordinarily large sale. (5) The court did not err in declining to permit an agent for soap manufactures to state the general knowledge of the grocery trade with reference to the place where defendant did its buying.

REYNOLDS, P. J.—This is an action to recover a balance claimed to be due on a bill of goods alleged to have been sold by plaintiff to defendant. It appears that the sale was made by a traveling salesman of plaintiff, a drug house, to a branch house of defendant, located at Caruthersville in this State, the articles sold being 350 dozen of a patent or proprietary medicine called Oxidine. The headquarters of defendant, its principal place of business, was situated in the city of St. Louis, but it had several branch houses at other places, among others, this one at Caruthersville, which was under the management of one Hogan.

There is no question as to the purchase, sale and price, nor over the delivery of the drugs to the Caruthersville house of the defendant. The sole question here

Digitized by Google

is the authority of Hogan to make the purchase. In addition to testimony tending to show that Mr. Hogan was the manager and in control of the branch house, and made purchases there, there is testimony in the record to the effect that Mr. Goddard, the vice-president of the defendant company, shortly before this action was brought, and after receiving a letter addressed to the defendant company, advising it that the attorney had a bill for collection, had called on plaintiff's attorney, and that attorney had shown him the bill here involved, as also the memorandum contract under which the drugs were bought. This memorandum was in writing and signed, "The Goddard Grocer Co., Purchaser. W. A. Hogan, Mgr;" also signed by the salesman of plaintiff and is in the form of an order on plaintiff to ship to defendant at Caruthersville, 25 gross and 50 dozen Oxidine, quoting price and terms of sale. Showing Mr. Goddard the letters and contract, the attorney testified that he said to Mr. Goddard that he did not see that defendant had any particular defense, provided the man who signed the contract in the name of the Goddard Grocer Company was authorized to do so; to this, as he testified, Mr. Goddard replied that there was no question about Hogan's authority to execute the contract, because he called up the main house in St. Louis by long distance telephone and told them he was ordering this, and the house hold him "to go ahead and be sure that he had the contract in writing and that it contained the entire contract." Mr. Goddard, testifying, admitted calling on the attorney and discussing the matter with him, but denied making this remark.

It was in evidence that the parent house at St. Louis had paid $193.41 on account of a portion of the goods covered by the contract, defendant claiming that in so paying it was not aware of the contract, and had refused to pay the balance. It was also in evidence that defendant had shipped the unsold goods

Digitized by Google

back to plaintiff, that plaintiff refused to receive them and that defendant had filed a claim with the railroad company which had carried the goods, for their value, that claim unadjusted.

The sole question in the case being one of agency, of the authority of the manager of the house at Caruthersville to make this purchase, was one of fact, to be determined by the jury. There was substantial evidence establishing the agency and the verdict is conclusive, provided there was no error in the action of the court on the instruction. It follows that the refusal of the instructions asked by defendant in the nature of demurrers to the evidence was proper. There was no error in those given. That given for plaintiff required the jury to pass on the fact of agency. Several asked and given at the instance of defendant repeated this in varied forms. Thus this was given at the instance of defendant:

"The jury are instructed that before the plaintiff can recover, you must believe from the evidence that W. A. Hogan was the agent of the defendant, and that it was within the scope of his agency to order the Oxidine, mentioned in the evidence, or that the defendant subsequently ratified the act of Hogan as such agent, and thereby rendered itself liable therefor."

With such instructions, given at its own request, defendant must abide the verdict.

The weight of the evidence was for the jury and the trial court; the jury found for plaintiff, the court confirmed the verdict, and we as an apellate court are concluded.

The point is made by learned counsel for appellant, that the trial court erred in allowing plaintiff to reopen its case and introduce testimony after defendant had interposed a demurrer to the evidence then given for plaintiff. When the request was made the demurrer had not been acted on by the court; the rec-

Digitized by Google

ord does not suggest that the court had even intimated how it would rule on the demurrer. Allowing the case to be reopened, plaintiff introduced testimony which was not merely cumulative, but bore directly on the issues; testimony of which it can be said it should have been introduced before plaintiff announced it had closed. It was material, relevant and not merely cumulative. It has been held in many cases that the matter of opening up a case is a matter resting within the sound discretion of the trial court (Jones on Evidence (2 Ed.), sec. 811), and unless that discretion is manifestly abused, the appellate court will not interfere. [Joplin Waterworks Co. v. City of Joplin, 177 Mo. 496, l. c. 531, 76 S. W. 960.] Looking at the matter as presented, we find no reason to hold that the discretion was arbitrarily or unwisely exercised.

Complaint is made of the rejection of evidence offered by defendant, to the effect that the purchase here involved was such a large one that it was out of the ordinary line of business of an agent of the character of the one who here acted for defendant. This evidence was rejected and properly so. It could have no bearing on this particular transaction, which spoke for itself. The offer went further and was to prove by one or more witnesses present, the general knowledge of the grocery trade at the time of this order that defendant did all of its buying at the St. Louis office, and the manager in charge of its office at Caruthersville had no authority to buy goods for defendant. This offer of this line of testimony was properly rejected for two reasons: First, there was no attempt to bring the knowledge of the custom home to this plaintiff, and whether there was any such custom or not, in the face of the positive testimony, that the vice-president of defendant company had said that this particular agent had authority to make this particular purchase, any custom of that kind would not be applicable or binding.

Digitized by Google

Finding no reversible error in the trial of the case, the judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

ALOIS ZACHRA, Respondent, v. AMERICAN MANUFACTURING COMPANY, appellant.

St. Louis Court of Appeals. Argued and Submitted December 1, 1913. Opinion Filed December 31, 1913.

1. **EVIDENCE: Statements of Counsel: Probative Force.** In an action against a corporation, prosecuted on the theory that it had assumed the obligations of another corporation, which was primarily liable for the cause of action counted upon, and was, therefore, liable to plaintiff, defendant's secretary testified that defendant had taken over the assets and assumed the liabilities of the other corporation, and defendant's counsel then stated that he was "inclined to think there was no such assumption of liability." *Held*, that the statement of counsel was no evidence, one way or the other.

2. **APPELLATE PRACTICE: Binding Effect of Theory at Trial: Corporations.** Where the petition did not aver that defendant corporation was the successor of the corporation primarily liable for the cause of action counted upon nor that it had taken over the assets or assumed the liabilities of such other corporation, but the case was tried on the theory that defendant was liable because of such assumption and evidence tending to substantiate it was introduced by plaintiff without objection on the part of defendant, it was proper for the court to submit the case to the jury on such theory.

3. **CORPORATIONS: Assuming Liabilities of Other Corporation: Pleading: Variance.** Where the petition did not aver that defendant corporation was the successor of the corporation primarily liable for the cause of action counted upon nor that it had taken over the assets or assumed the liabilities of such other corporation, but the case was tried on the theory that defendant was liable because of such assumption, evidence tending to substantiate it was at most a variance, and did not amount to a failure of proof, and appellant would not be heard to urge the variance as error, on appeal, in as much as it did not object to the introduction of such evidence nor file an affidavit of surprise, as required by Sec. 1846, R. S. 1909.

Digitized by Google

4. **PLEADING: Variance: Mode of Objecting.** Advantage cannot be taken, on appeal, of a variance between the pleadings and the proof, unless the objection was raised as provided by Sec. 1846, R. S. 1909.

5. **CORPORATIONS: Taking Over Assets of Other Corporation: Liability of Transferee.** A corporation which takes over the business of another corporation and succeeds to its franchises and property, and is, in short, the same entity under another name, is liable, even at law, for the liabilities of the other corporation.

6. **APPELLATE PRACTICE: Reviewing Sufficiency of Evidence: Complete Abstract of Evidence Required.** Where appellant stated in his abstract of the record that he had printed only such parts of the evidence as were relevant to the questions presented for decision, the appellate court was not required to consider the sufficiency of the evidence to support the judgment, since appellant, with whom the duty lay to present it to the appellate court, omitted to present all of it.

7. **COURTS: Circuit Courts: Presumption of Right Action.** A circuit court, being a court of general jurisdiction, is presumed to have acted correctly.

8. **CONSTITUTIONAL QUESTION: Time for Raising: Appellate Practice.** In order for one to avail himself of a constitutional right which has been denied, he must raise the question at the first opportunity; and hence where an appellant, in his motion for rehearing filed in the Court of Appeals, alleged that if the judgment of affirmance rendered by the court should stand, appellant would be deprived of its constitutional rights, a constitutional question was not presented for determination, since that question could and should have been raised when the judgment was rendered in the trial court.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillen,* Judge.

AFFIRMED.

Percy Werner for appellant.

(1) The trial court erred in refusing to direct a verdict for the defendant. (a) The testimony of plaintiff's own witness, Murray and the documentary evidence, show conclusively that the defendant in this case was not in existence in the month of October,

Digitized by Google

1906, and consequently that plaintiff could not have been in its employ at that time. (b) The testimony of plaintiff's own witnesses, and the documentary evidence, show with equal conclusiveness that the corporation by which plaintiff was employed in October, 1906, was a different corporation from the present defendant, that said former corporation is now in the hands of the St. Louis Union Trust Company, as trustee, for the purpose of collecting its assets, paying its liabilities, and distributing its remaining funds to its stockholders. (2) A judgment against this defendant, the Massachusetts corporation, will not bar a subsequent action against the West Virginia company or its trustee. (3) Even if it were true, which it is not, that the present defendant had assumed the liablities of the former corporation, the one by which plaintiff was employed, plaintiff could not recover in this action, since his cause of action is not based upon such a state of facts, is not a proceeding in equity to compel the defendant to pay this alleged liability of the former corporation, but is an action at law by an alleged employee to recover from his alleged employer damages for an injury suffered while in the employ of the defendant itself. (4) To allow a recovery against one corporation for a tort committed by another and different corporation would infringe that provision of the Fourteenth Amendment to the Constitution of the United States, forbidding any State to deny to any person within its jurisdiction the equal protection of the laws.

Hall & Dame for respondent.

(1) The corporation which answered as the defendant is the same corporation that owned and operated the plant mentioned in October, 1906. The Massachusetts Company was a mere continuation of the West Virginia Company and was identical as a

Digitized by Google

corporate body with it, and is liable for its torts. Palmer v. Railroad, 142 Mo. App. 633; Goode v. Land, Lumber & Handle Co., 153 S. W. 1107; Hunter v. Vehicle Co., 190 Fed. 665; Jones v. Francis, 127 Pac. 307; Langhorne v. Railroad, 91 Va. 369; Grenell v. Gas Co., 112 Mich. 70; Austin v. Bank, 49 Neb. 412; Friedenwald v. Cigarette Co., 117 N. C. 544; Berry v. Railroad, 52 Kas. 774; Railroad v. Pruitt, 134 Ind. 557; Railroad v. Maffitt, 75 Ill. 524; State v. Railroad, 77 Maryland 489; Railroad v. Boyd, U. S. Sup. Ct., 228 U. S. 482; Coffey v. Bank, 46 Mo. 140; Blank v. Mining Co., 95 Cal. 524; 2 Cooke on Corporations (4 Ed.), 1354; Jennings Neff & Co. v. Ice Co., 159 S. W. 1088; Parsons Co. v. Hamilton Co., 78 N. J. L. 309; Cooper v. Light & R. Co., 35 Utah, 570; Seymour v. Railroad, 132 Pac. 427. (2) The affidavit in defendant's answer has no bearing upon the issues. The defendant could not deny its own existence. Hammar v. Carriage Co., 155 Mo. App. 441; Meyer Bros. v. Ins. Co., 73 Mo. App. 166; Donk Bros. v. Aronson, 102 Mo. App. 590; Flynn v City of Neosho, 114 Mo. 567; Eubanks v. Edina, 88 Mo. 654; Witthaus v. Railroad, 64 Mo. 523. (3) By appearing and going to trial as defendant the party answering admits that it is the defendant, that is, the party sought to be charged, and the corporation answering is thus precluded and estopped from claiming that it is a different corporation from the one described in the petition as owning and operating the plant where plaintiff was injured in October, 1906. The name is the same. The dropping of "The" from the name is inconsequential. Hammar v. Carriage Co., 155 Mo. App. 441; Dist. v. Thompsen, 116 Fed. 832; Newcomb v. Railroad, 182 Mo. 687; Realty Co. v. Packing Co., 112 Mo. App. 271; Railroad v. Shirley, 20 Kan. 660; Kelly v. Mississippi Cr. Co., 1 Fed. 564; 10 Cyc. 145; Railroad v. Anderson Co., 150 S. W. 239; Forbes v. McDougle, 150 S. W. 745; R. S. 1909, secs. 2978, 3021, 3339, 3037, 3360. (4) The judgment bars

Digitized by Google

a subsequent action against either the old or the new company. This follows as a necessary result from the rules laid down in the authorities under point I, supra. (5) The service and return of the writ was sufficient to bring the West Virginia Company into court if that company were not the same as the Massachusetts Company. The return of the sheriff is conclusive as to that. Newcomb v. Railroad, 182 Mo. 687; Realty Co. v. Packing Co., 112 Mo. App. 271. (6) In any event plaintiff could maintain this suit. Whatever the relation of the Massachusetts Company to the West Virginia Company, the former assumed the assets and liabilities of the latter, and is liable to plaintiff, and plaintiff is not required to prosecute two suits. Any variations, between pleading and proof are immaterial and even if material are not taken advantage of as required by statute. Coffey v. Bank, 46 Mo. 140; Jones v. Francis, 127 Pac. 307; Langhorne v. Railroad, 91 Va. 369; Friedenwald v. Tobacco Works, 117 N. C. 544; Sharples Co. v. Creamery Co., 111 N. W. 783; Freeman v. Tel. Co., 160 Mo. App. 271. (7) The party answering and defending had full knowledge of plaintiff's claim and that a suit by plaintiff on this same subject of action was pending at the time of the alleged change from a West Virginia to a Massachusetts Company. If the latter company desired to keep aloof it should have filed motion to quash the sheriff's return. Zachra v. Mfg. Co., 159 Mo. App. 96, is a part of this court's records, and the evidence in this present suit referred to that suit. Forbes v. McDougle, 150 S. W. 745; Seymour v. Railroad, 132 Pac. 427.

REYNOLDS, P. J.—Plaintiff brought his action against the defendant American Manufacturing Company, a corporation, averring that defendant is a corporation duly organized and existing and doing business under the laws of the State of Missouri, and

Digitized by Google

that it is now and at the time thereinafter mentioned in the petition, was the owner of, and engaged in operating, a certain hemp manufacturing plant, at Ninth and Barry streets in the city of St. Louis. Averring that on October 15, 1906, and while he was in the employ of defendant at the plant above mentioned, and under the direction of defendant was engaged in doing a particular piece of work, plaintiff avers that he was injured through the negligence of defendant, and for that injury he claims judgment in the sum of $4000.

A writ was issued directed to the sheriff of the city of St. Louis, commanding him to summon "American Manufacturing Company, a corporation," to appear before the court to answer the complaint of Zachra. The sheriff returned this as served "on the within named defendant, the American Manufacturing Company, a corporation," by delivering a copy of the writ and petition to "H. R. Murray, secretary of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of service."

The defendant appearing, answered, denying that it was a corporation duly organized and doing business under the laws of the State of Missouri, denied that it was at the time mentioned the owner of and at the time engaged in operating the hemp manufacturing plant specified in the petition and denied each and every other allegation in the petition. Along with this answer, an affidavit of H. R. Murray was filed, setting out that he is the secretary of American Manufacturing Company; has read the statements in the answer relative to the incorporation of the defendant; that they are true and that said American Manufacturing Company which now owns and operates the plant mentioned in the petition was organized under

Digitized by Google

the laws of the State of Massachusetts on April 13, 1910, and did own and operate the plant at the time it was served with a copy of the writ and petition in the case and that this defendant was not in existence and did not own or operate the plant at the time mentioned in the petition, to-wit, October, 1906. There was no reply.

The only point involved in this appeal turns on the identity of the defendant served with the corporation which owned the plant at the time of the accident in 1906, and its liablity for the tort, that liability accruing and the injury sustained when the plant was owned and operated by another corporation called "The American Manufacturing Company." The latter, as appeared by the evidence in the case, was a corporation organized under the laws of the State of West Virginia and licensed to do business in this State, the certificate of the Secretary of State, issued August 20, 1891, showing that, and also that it was a corporation with a capitalization of $2,794,500, and that the amount of its capital stock represented in the State of Missouri was $450,000. An affidavit of retirement from business in this State by "The American Manufacturing Company," above mentioned, was also in evidence, it appearing that it was filed with the Secretary of State January 15, 1911. It was further in evidence that on January 10, 1911, a license to do business in this State was issued by the Secretary of State to "American Manufaturing Company," incorporated under the laws of the State of Massachusetts, its capitalization stated at $6,000,000, and the amount of its capital stock represented by property located and business transacted in this State being $1,578,000.

While the secretary of defendant company was on the witness stand as a witness, called by plaintiff, in answer to a question from counsel for plaintiff as to whether as a matter of fact American Manufacturing

Digitized by Google

Company of Massachusetts was the same concern so far as its officers and property and so far as its business is concerned, as the former, The American Manufacturing Company, organized under the laws of West Virginia, he answered that the first named company, the Massachusetts corporation, by arrangement had assumed the assets and liabilities of the West Virginia Company some time in December, 1910. Counsel for defendant called the attention of the witness to the fact that this arrangement was in writing, and objected to this statement, on the ground that the writing would show the agreement between the parties. Asked by the court if the agreement was not in court in possession of counsel, counsel said: "I do not know if we can produce it, but if we can we will be glad to do so. I am inclined to think there was no such assumption of liabilities, because I understand there are trustees of the West Virginia Company now in existence and in charge of its affairs, who are settling any claims against the West Virginia Company." Asked if that was not correct, the witness answered that it was. But he testified that the Massachusetts Company had been formed to take over the business of the old company and had been operating it since 1910. This witness, asked if it was not true that the only difference between the management of the company at the time plaintiff was injured and now, is in the name, answered, "Yes, the name and under the law of the two different States;" that the plant operated was the same; operated with substantially the same officers and employees; that the change is a change of form under the laws of different States.

It is stated in the abstract that there was testimony as to the accident, tending to prove that it had occurred in October, 1906, at the plant then being operated and owned by the West Virginia corporation.

At the conclusion of the testimony for plaintiff, as well as at the conclusion of all the testimony in the

Digitized by Google

case, demurrers to the evidence were interposed by defendant and were overruled.

At the instance of plaintiff the court instructed jury, that if they found from the evidence "that defendant was a corporation and owned and operated the hemp manufacturing plant at Ninth and Barry streets, St. Louis, Missouri, mentioned in the evidence, on or about October 15, 1906, and that at said time plaintiff was in the employ of defendant at its said plant," etc., setting out the facts as to the accident, plaintiff was entitled to recover. At the instance of defendant, the court instructed the jury that if they found from the evidence that defendant was not in control and managing the plant in question in the year 1906, and that plaintiff was not in the employ of this company at the time of the accident in question but was in the employ of another corporation, which owned and operated the plant at that time, their verdict should be for defendant.

The jury returned a verdict in favor of plaintiff and against defendant in the sum of $2000, from which, interposing a motion for new trial and excepting to that, as well as to the adverse ruling of the court on the demurrers, and to the giving and refusing of instructions, defendant has duly perfected its appeal to this court.

The facts attendant upon the accident, it is stated by counsel, were involved in Zachra v. American Manufacturing Co., 159 Mo. App. 96, 139 S. W. 518. On the judgment there being affirmed, plaintiff instituted this, a new action.

The evidence, without contradiction, is to the effect that there were two corporations, one organized under the laws of the State of West Virginia, the other under the laws of the State of Massachusetts, the latter the defendant here, and that is practically conceded as a fact, respondent claiming that the defendant had assumed or became liable for the debts of this

Digitized by Google

West Virginia corporation, the latter not impleaded. Each of them was authorized, as foreign corporations, to transact business in this State. So that the averment in the petition, that defendant, meaning by that the Massachusetts corporation, was doing business under the laws of this State, is correct, although it was not a Missouri corporation. That this defendant, the Massachusetts corporation, was not doing business in this State, or the owner and operating the plant at the time of the accident which is the foundation of the cause of action, is clear. It is equally clear that in 1910, the West Virginia corporation retired from business in this State and the Masachusetts corporation, the defendant here named and summoned, bought out its property, its plant, and took over the business which the West Virginia corporation had formerly carried on in this State.

The sole question to be determined was whether the Masachusetts corporation was liable for the obligation of the West Virginia one. We have set out the testimony on this phase of the case. It shows that the executive officers, with one or two exceptions, one of those exceptions being the secretary, and probably a majority of the stockholders of the two corporations, were the same. The stock of the one had been exchanged, share for share, for that of the other. The plant was the same. The secretary of this defendant testified that the one company had been formed to take over the business and property of the other and that it had done so. It appears that when one company took over the assets of the other, it was by a written agreement. That was not produced. All that counsel himself would say of it, after the secretary of the defendant had testified that the Massachusetts corporation had assumed the assets and the liabilities of the West Virginia corporation, in December, 1911, that he, counsel, was "inclined to think there was no

Digitized by Google

such assumption of liabilities." That is no evidence one way or the other.

While it is true that there are no averments that the one corporation is the successor of the other, or had taken over the assets or assumed the debts of the other, the case was tried on that theory, and without objection by the defendant. That being so, the court was justified in submitting the issue to the jury as it did by the instruction given at the instance of plaintiff and defendant. [Litton v. Chicago, B. & Q. R. Co., 111 Mo. App. 140, 85 S. W. 978.]

Having been so tried, without objection on the part of appellant, it is too late to raise, in the appellate court, the point of departure or of the lack of sufficient averments. There is here no total failure of proof—at most it is a case of variance, and that is only to be raised as provided by the statute. [Mellor v. Missouri Pac. Ry. Co., 105 Mo. 455, l. c. 464, *et seq.*, 16 S. W. 849.]

There was substantial evidence, admitted without objection, of identity of the two corporations, of transfer of all the property of one to the other, and of assumption by one of the liabilties of the other. The authorities are numerous in support of the proposition that when one corporation takes over the business of the other and succeeds it in its franchise and property, is, in short, the same entity under another name, the one is liable, even at law, for the debts of the other. Without citing the decisions of our own courts, for they are well known, in Austin v. Tecumseh National Bank, 49 Neb. 412, will be found an illuminative discussion of this proposition, and review of the decisions of courts of other States upon it. [See, also, Indianapolis, Cincinnati & Lafayette R. R. Co., 29 Ind. 465, where this precise point is decided the same way.]

Appellant states in his abstract that he has printed only such portions of the evidence as are relevant to the question presented for decision. In this

Digitized by Google

state of the record, we are not required to consider the sufficiency of the evidence to support the judgment, in any event, for the reason appellant, upon whom the duty lay to bring it here, has omitted to present it all. The presumption must go in aid of the circuit court, that a court of general jurisdiction, that it acted rightly in the premises. Therefore, when its finding is challenged as being unsupported by the evidence, it is not competent for counsel to print in the abstract only such testimony as is, in his opinion, relevant, and especially is this true when the case comes here in the short form provided under the statute. To permit counsel to print only such testimony as is, in his opinion, relevant to the issue and then ask that the verdict be set aside for the insufficiency of the testimony is to abdicate the power of the court with respect to such opinion. It is for the appellate court, and not the counsel, to say whether the evidence is relevant and sufficient. It appearing as it does that counsel has not brought up all of the evidence introduced in the case and that his only point made is a challenge of its sufficiency, the judgment should be affirmed on this ground alone. [Reed v. Peck, 163 Mo. 333, 63 S. W. 734; Davis v. Vories, 141 Mo. 234, 42 S. W. 707; John Schoen Plumbing Co. v. Brewing Co., 126 Mo. App. 268, 102 S. W. 1064; Nash v. Kansas City, etc., Brick Co., 109 Mo. App. 600, 83 S. W. 90; Ogelbay v. Kansas City College of Dental Surgery, 71 Mo. App. 339; Epstein v. Hammerslough Clothing Co., 67 Mo. App. 221; Furstenfeld v. Furstenfeld, 152 Mo. App. 726, 131 S. W. 359.]

The attention of counsel for appellant was called to this defect in his abstract by timely motion, which we overruled, with leave to counsel to file an additional abstract, if desired. This, counsel has failed to do.

Counsel for appellant, after the filing of the original opinion herein, moved to transfer this cause to the

Digitized by Google

Supreme Court of the State on the ground that appellant, in its motion for rehearing, has assigned as a ground that if our judgment of affirmance stands, appellant will be deprived of its property without due process of law, in violation of section 30, article 2, of the Constitution of this State and of the first section of the Fourteenth Amendment to the Constitution of the United States.

Our Supreme Court has held in very many cases that if parties desire to avail themselves of a constitutional right which has been denied, they must raise the question at the first opportunity. That was present in this case, if there is anything in appellant's point, when the verdict and judgment were rendered in the trial court. But the point was not then made either by motion for a new trial or by one in arrest.

The judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

OTTO MEYER et al., Respondents, v. JOHN W. CORLEY PUBLISHING & PROMOTION COMPANY et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted December 2, 1913. Opinion Filed December 31, 1913.

1. **PRINCIPAL AND AGENT: Fraud of Agent and Third Party: Rights of Principal.** If a third party contracting with an agent agrees to pay him a commission or other reward for making or bringing about the contract, or agrees to give him a part of the price to be paid by the principal, the contract is voidable at the option of the principal, but it is not void, and the third person cannot avoid it if the principal chooses to hold him.

2. **———: ———: ———: Bailments.** In an action for the value of a horse which was bailed to defendant through its agent and not returned to plaintiff, where plaintiff admitted that he and the agent had a secret understanding by virtue of which a certain part of the hire paid by defendant was to

Digitized by Google

be given to the agent by plaintiff, *held* that plaintiff was not entitled to recover, since the secret agreement was a fraud upon defendant, relieving it from liability as bailee.

3. JUSTICES' COURTS: Pleading: Defenses. In an action on a contract made for defendant by its agent, begun in a justice's court, where no formal pleadings are required, defendant could defend on the ground of illegality of the contract, as being collusive between its agent and plaintiff, without pleading such illegality, even in the circuit court, on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin,* Judge.

REVERSED.

Lehmann & Lehmann for appellant John W. Corley Publishing and Promotion Company.

Where the agent of one party to a contract receives a secret commission from the other party thereto, the enforcement of such contract is against public policy. One who bribes an agent to make a contract for his principal can enforce no rights arising out of said contract against the principal. McClure v. Ullman, 102 Mo. App. 697; De Steiger v. Hollington, 17 Mo. App. 382; City of Findlay v. Pertz, 66 Fed. 427; Donovan v. Campion, 85 Fed. 71; Black v. Miller, 71 Ill. App. 342; Whitley v. James, 121 Ga. 521, 49 S. E. 600; Clark and Skyles on Agency, 1905 Ed., Section 456; Panama & South Pacific Co. v. India Rubber Co., 10 Ch. 15, 32 L. T. Rep. N. S. 517.

Charles M. Polk for appellant publishers, George Knapp & Co.

(1) One of the essential elements of a bailment is the delivery of the thing bailed. The burden of proof was on respondents to show the delivery of the horse claimed to have been delivered in this case. No delivery was shown in this case. 5 Cyc. 161; Von Zile v. Bailments, par. 19; Evans v. Automobile Co., 121 Mo.

Digitized by Google

App. 266; Prince v. Cotton Compress Co., 112 Mo. App. 49; Baker v. Railroad, 52 Mo. App. 602; Feltman v. Gulf Brewery, 42 How Pr. 488. (2) The burden of proof was on respondents to show that the Corley Company or its employee had authority to hire the horse from respondents for or in the name of this appellant. The declarations of such employees are not competent for such purpose. Oil Co. v. Zinc Co., 98 Mo. App. 324; Jolly v. Huebler, 132 Mo. App. 675. (3) It was the duty of respondents to inquire into and determine the real authority of the employees of the Corley Company. Kilpatrick v. Wiley, 197 Mo. 123. (4) Unless appellant did hire the horse from the respondents, or negligently or wrongfully mistreated it and thereby occasioned its death, this appellant is not responsible for the failure to return it.

Hiram N. Moore for respondent.

REYNOLDS, P. J.—Plaintiffs, a partnership composed of Otto Meyer and James Helm, commenced their action before a justice of the peace of the city of St. Louis against John W. Corley Publishing & Promotion Company, a corporation, hereafter referred to as the Corley Company, and Publishers George Knapp & Company, a corporation, the latter publishers of a newspaper called The St. Louis Republic, this defendant hereafter referred to as the Republic. It is set out in the statement filed before the justice that plaintiff "for hire let to defendants one certain bay horse of the value of $200, which was to be returned on the evening of said day and that defendants have failed and refused to so return the same, although demanded so to do." Judgment is asked for $200 and costs. Judgment went against both defendants for the amount claimed, from which judgment they appealed to the circuit court, where on a trial anew before the court and a jury, defendants, as before the justice, interpos-

Digitized by Google

ing no written pleading, judgment went against both defendants. Interposing motions for new trial and excepting to the action of the court in overruling them, defendants have duly perfected their appeal to this court.

It appears that the Republic entered into a contract with the Corley Company, by which it authorized the latter to canvass for subscriptions for its daily and Sunday issues in St. Louis and vicinity, authorizing the Corley Company to offer a lady's or gentleman's watch as a premium in connection with all subscriptions taken by responsible parties who will contract to take the daily and Sunday Republic for a period of eighteen months, such subscribers to pay $1.50 on delivery of the watch and eighty cents per month thereafter for eighteen consecutive months. One of the conditions named in this contract was that the Corley Company was to organize and conduct the entire canvass, paying all the expenses thereof, including the manager, solicitors, delivery men and delivering the premiums to subscribers. After this contract was entered into the Corley Company commenced the work of canvassing for subscribers, etc., doing the canvassing by means of agents. It appears that the Corley Company placed this business of canvassing in charge of a man named Beck; at least Beck appears to be the one who had charge of hiring the teams for the work. Beck, representing to plaintiffs that he would require from four to five teams a day, made an arrangement to hire the teams needed in this work from plaintiff, at the agreed price of $2.50 per day for each team. It was agreed that Beck would notify plaintiffs at their livery stable, either by going there in person or by telephone, of the number of horses and buggies desired on a given day, the teams to be delivered on the street in front of or along the side of the Republic office at Seventh & Olive streets, in St. Louis. One of the partners, Mr. Helm, asked Beck for whom he was hiring these teams.

Digitized by Google

Beck told him that it was for the St. Louis Republic; that he was securing subscriptions for that paper. According to the arrangement horses and buggies were delivered from time to time in front of or along the side of the office of the Republic in the morning and would be returned to plaintiffs about six o'clock in the evening. The teams were delivered through men or boys employed by respondents. The bills for the teams were made out to the Republic but were delivered to and paid by Beck at the Republic office, except on one occasion when they appear to have been paid at the office of the Corley Company. It was the custom that when employees of the livery stable drove the teams to Seventh and Olive, they hitched the horses and went up into a room or office of the Republic Building, marked "Circulation Department," and told whoever they found there that the teams were ready. That was done on all occasions with practically few exceptions. One exception was on May 27, 1911. On that day, however, plaintiffs, in usual course and under orders from some one at the Republic office, sent out a horse and buggy and as usual placed it on Seventh street in front of the Republic office. It does not appear that the driver, who on this occasion took the rig to the usual place, notified anyone in the Republic office that it was there. He drove it up, hitched, it as usual and left. The next known of this rig was that night when the horse was found lying dead near a drinking trough in one of the parks of the city. There was testimony to the effect that the horse and buggy had been driven there by two young men, apparently eighteen or twenty years of age, and the persons who saw it when at the trough noticed that the horse was covered with lather, was heaving, and had every appearance of having been overdriven. No one identified the young men as having any connection with either of the defendants; neither of them, however, corresponded in appearance to Beck, who was a man of

Digitized by Google

about thirty-five years of age. Beck left the city some time after the death of the horse, and was not produced as a witness in this case. There was testimony to the effect that the horse was worth $200, possibly more.

During the cross-examination of one of the plaintiffs, Mr. Helm, it developed that he was the one who had made the arrangement with Beck for hiring these teams; that the price to be paid for them by the Republic was $2.50 a day, but that plaintiffs had made an arrangement with Beck whereby they were to give and did give Beck twenty-five cents of this $2.50 on each team. That, said the witness, was a private arrangement between himself and Beck. His firm had charged up the livery in the bills rendered to the Republic at $2.50 a day. Beck would send up the money and pay plaintiffs or come up and pay it, and his commission would be paid by plaintiffs, or he would send up and get the money and come out and pay it, and his commission was paid him. Mr. Helm testified that so far as he knew, nothing had taken place between him or his firm and Beck that would indicate that Beck was turning this commission over to his employers; Beck would simply go into the office of the Republic, get the money, come outside and pay the bill for the teams, which were always billed for the full amount. Asked if he knew that the people Beck was working for did not know anything about Beck getting this cash commission, Mr. Helm answered: "That was his lookout, not mine. He was working for the St. Louis Republic, so he told me, and I never knew nothing different from anybody else." He further testified that he made out the bills to the Republic for the full amount and gave Beck twenty-five cents a team on each day's livery in cash. Beck paid the bill in full to plaintiffs and they would give him back the twenty-five cents in cash. Asked if that twenty-five cents was Beck's personal perquisite, Mr. Helm said he did not know. Asked if

Digitized by Google

that was his assumption, he answered that that was his opinion of it.

At the close of plaintiffs' evidence in chief, in which the foregoing testimony had been given, defendants asked an instruction that, "It being admitted by plaintiffs that they paid the alleged servant of defendants a secret commission for driving the horse in question in this case, the plaintiffs are not entitled to recover and your verdict must be for the defendants." This was refused, defendants excepting. An instruction asked at the close of all the evidence in the case was to the effect that if the jury found and believed from the evidence that at the time in question Beck was hiring the horse and wagon ostensibly as agent for and on behalf of defendant Publishers, George Knapp & Co., but actually in behalf of the Corley Publishing Company and was receiving a secret commission from plaintiffs, then plaintiffs are not entitled to recover and their verdict must be for defendants. This was refused, defendants duly saving exception.

Plaintiffs having closed their evidence in chief, their counsel stated to the court that this was a case of bailment and he believed he would rest for plaintiff; that the burthen of proof now shifted upon defendants and he would rest his case there; that the burden in the case of bailment shifts when the plaintiff makes out a case of delivery and failure to return; that he had shown that overwhelmingly and the burden of proof now shifts to defendants. Following out this same theory, that this is an action on a contract of bailment, the first instruction asked by plaintiffs began thus: "If you believe and find from the evidence in this case that plaintiffs on or about the 27th day of May, 1911, delivered and hired to defendant a certain bay horse," etc. The argument which the learned counsel for respondents has presented to us begins with the statement that, "This case involves the value of a horse alleged to have been bailed to the

Digitized by Google

appellants, the horse having been killed while in the possession of appellants." There is therefore no question but that the case was presented and tried on the theory of a contract of bailment. It is to be determined then on the principle applicable to contracts.

The evidence of one of the plaintiffs, testifying as a witness for plaintiffs in this case, demonstrates beyond room for doubt, that the bargain between the agent who hired these teams, and one of the proprietors of the livery stable from whom that agent obtained them, was a corrupt agreement as between those parties.

It is said in an accepted work on the law of agency: "If an agent in contracting with a third person on behalf of his principal is guilty of a fraud upon the principal, or breach of trust, to which the third party is privy, or if the third party enters into an agreement with an agent to pay him a commission or other reward for making or bringing about the contract, the contract is voidable at the option of the principal. It is not void, and the third person cannot avoid it if the principal chooses to hold him, but the principal may repudiate it because of the fraud." Clark & Skyles on Agency (1905 Ed.), sec. 456.

The appellate courts of our State have spoken in no uncertain terms on this same proposition. One of the earliest cases and a leading one in our State on this, is that of DeSteiger v. Hollington, 17 Mo. App. 382. There it is said by Judge Ellison (l. c. 388): "So jealous is the law as to the relation between principal and agent, that in passing on questions of this character, arising between them, the mere fact of the discovery of no actual fraud or bad faith does not relieve the case in the least. 'The cases are nearly if not quite uniform, where the double employment exists and is not known. No recovery can be had against the party kept in ignorance and the result is not made to turn on the presence or absence of designed duplic-

Digitized by Google

ity and fraud, but is a consequence of established policy.' [Scribner v. Collar, 40 Mich. 375.] The same principle is well expressed in the case of Everhart v. Searle, 71 Pa. St. 256. It is said in that case that, 'it matters not that there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.' And to the same effect is Rice v. Wood, 113 Mass. 133." This rule has been followed and enforced in many subsequent cases, of which the leading ones in our State may be said to be McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325; Corder v. O'Neil, 207 Mo. 632, 106 S. W. 10, and Shohoney v. Quincy, O. & K. C. R. Co., 231 Mo. 131, 132 S. W. 1059. It is true those cases are over contracts for the sales of land where the agent, without the knowledge and consent of the party to the transaction by whom he was paid and for whom he was acting as agent, was also acting as agent and receiving compensation from the other. But the same principle applies to all contracts tainted with fraud. Thus in the case of the City of Findlay v. Pertz, 66 Fed. 427, it was applied to a case of a sales agent of automatic separators. That agent, while in the employ of the city, ordered from the owners a number of separators, upon the sale of each of which the sellers allowed him a commission, the agreement for such commission being unknown to the board of trustees of the city. The Circuit Court of Appeals of the sixth circuit held that the conduct of the agent in acting as such for both parties without the knowledge of the board and of the sellers in procuring the contract through such agency, was fraudulent as against the city and entitled it to rescind the contract.

In Toledo, Wabash & Western Ry. Co. v. Brooks, Admx., 81 Ill. 245, it was applied to a case of a party, who, while being transported on a train of the railroad company, had been killed. It appearing that the passenger had induced the conductor to violate a rule of

Digitized by Google

the company in carrying him without the payment of any fare, the Supreme Court of Illinois held, that appearing, the passenger and the conductor were engaged in a deliberate fraud on the company and the administratrix of the deceased could not recover. To the same effect is the decision of the Supreme Court of Minnesota in McVeety v. St. Paul, Minneapolis & Manitoba Ry. Co., 45 Minn. 268.

In Panama & South Pacific Telegraph Co. v. India Rubber, G. P. & T. Works Co., 32 L. T. (N. S.) 517, determined in the English Court of Appeals in Chancery, it appearing that an agent had made a secret arrangement for a commission or compensation with the party with whom he was dealing on behalf of his principal, it was held that there could be no recovery on the contract; that a contract entered into under such circumstances could be set aside and the money paid thereunder recovered. Lord Justice JAMES there said (l. c. 518): "I take it, according to my view of the law of this court, to be clear that any surreptitious dealing between one principal and the agent of the other principal, is a fraud on such other principal cognizable in this court."

The learned trial court erred in not instructing the jury that plaintiff could not recover. We have not overlooked the fact that this defense of illegality was not pleaded by defendants. Our Supreme Court has held in several cases, notably in McDearmott v. Sedgwick, 140 Mo. 172, 39 S. W. 776, that the defense of illegality of the contract sued on must be specifically pleaded in the absence of anything in the petition disclosing such illegality. That is but the recognition and application of a very old principle. That rule, however, has no application here as this action was commenced before a justice of the peace and no formal pleading upon the part of the defendant is required, the latter being at liberty to interpose any defense that it may have to defeat the action, even if interposing it

Digitized by Google

for the first time in the circuit court on appeal, save that where defendant wishes to avail himself of the counterclaim he must have interposed it in the justice's court.

Our conclusion upon the case is that as it was developed on the trial of this case, on the evidence of plaintiffs themselves, that this corrupt bargain had been made for the payment of this secret commission by plaintiffs to the party acting as agent of the others, and whether for one or the other, or both of the defendants, is immaterial, plaintiffs cannot recover.

In this view of the case it is not necessary to consider any of the other points made.

The judgment of the circuit court is reversed. *Nortoni* and *Allen, JJ.*, concur.

GEORGE MINEA, Respondent, v. ST. LOUIS COOPERAGE COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted December 4, 1913. Opinion Filed December 31, 1913.

1. **NEGLIGENCE: Evidence: Proof of Subsequent Repairs.** In an action by an employee for personal injuries sustained from an unguarded machine at which he was working, it was reversible error for the court to admit evidence that the machine was guarded after the accident, offered for the purpose of showing that it could have been guarded, without calling the attention of the jury at the time to the fact that it was admitted for such specific purpose only.

2. **APPELLATE PRACTICE: Review of Admission of Evidence: Limiting Instruction.** The general rule that it is the duty of counsel to ask an instruction limiting testimony to a particular purpose is not applicable where, in an action by an employee for injuries sustained from an unguarded machine, evidence that the machine was guarded after the accident, offered for the purpose of showing that it could have been guarded, was

Digitized by Google

erroneously admitted by the court without calling the attention of the jury at the time to the fact that it was admitted for such specific purpose only.

3. **APPELLATE PRACTICE: Trial Practice: Review of Admission of Evidence: Prerequisites.** In order to secure a review of the admission of evidence volunteered by a witness, it is essential that a motion be made at the trial to strike it out.

4. **CORPORATIONS: Evidence: Admissions of Officers.** The general rule is, that declarations by officers of corporations are admissible against it only when made while acting within the scope of their authority and as a part of the *res gestae* of the particular transaction.

5. ———: ———: **Proof of Official Character.** The agency or official character of an officer of a corporation must be proved by evidence other than his own declarations, in order to make his declarations in the course of his employment admissible against the corporation.

6. **EVIDENCE: Hearsay.** The rule excluding hearsay evidence is mainly based on the fact that there is no opportunity for cross-examining the declarant.

7. ———: **Evidence Given in Another Case.** In an action by an infant employee's father for loss of the infant's services from personal injuries sustained while employed by defendant corporation, the evidence of an officer of defendant, given at the trial of an action by the infant, by his father as next friend, against defendant for such injuries, was admissible, if properly proved; the question of liability in both cases turning on the same facts and questions of law and the parties being substantially the same.

8. ———: **Evidence Preserved in Bill of Exceptions.** Where one offers to prove testimony given in another case by means of a bill of exceptions, he must read all of it.

9. **RES ADJUDICATA: Conclusiveness of Judgment Rendered in Another Case: Parties.** The fact that a minor employee, in an action against his employer for personal injuries, recovered damages for expenses incurred by him, because of the injuries, would not prevent his father, in another action for loss of services, medical expenses, etc., from recovering expenses incurred by him as a result of such injuries to his son, even though the latter recovered greater damages for such items than he should.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm,* Judge.

Digitized by Google

REVERSED AND REMANDED.

Charles E. Morrow for appellant.

(1) The court committed reversible error in permitting the plaintiff to show that the machine in question was guarded after the accident. Miniea v. St. Louis Cooperage Co., 157 S. W. 1006; Bailey v. Kansas City, 189 Mo. 510; Schermer v. McMahon, 108 Mo. App. 836; Railroad v. Hawthorne, 144 U. S. 202. (2) The former suit of the son brought by the plaintiff, the father, as next friend, in which he sued for medicine, medical attention and nursing, is *res adjudicata* on plaintiff. The father having brought suit as next friend for his son for these items is estopped to afterwards sue for the same. Neumeister v. Dubuque, 47 La. 465; 23 Cyc., 1112; Rodney v. Gibbs, 184 Mo. 9. The fact that the former suit was pending on appeal where a *supersedeas* bond had been given at the time of the trial of this cause was no defense to this plea of *res adjudicata.* Rodney v. Gibbs, 184 Mo. 14. To say the least this former cause was pending and the plaintiff could not maintain this action while it was pending. Rodney v. Gibbs, 184 Mo. 10. (3) The court erred in allowing the plaintiff to prove by witness Sylvester Miniea that Mr. Meyer, president of defendant company, testified on trial of the case of Miniea, by Etc., v. St. Louis Cooperage Company, that the machine in question could be guarded. It was hearsay, and did not bind the defendant. McDermott v. Radwood, 87 Mo. 285; Phillips v. Radwood, 211 Mo. 438. The president of the company was but the agent of the company, and what he says against the company is hearsay, unless a part of the *res gestae,* or made in the line of duty. McDermott v. Radwood, 87 Mo. 301; Phillips v. Radwood, 211 Mo. 438. If this evidence was competent the bill of exceptions, containing what Mr. Meyer did testify and all he said, was the best evidence,

Digitized by Google

and the court erred in permitting the plaintiff to prove by the witness Sylvester Miniea that he admitted the machine could be guarded. When the court ruled that the plaintiff had to introduce the whole of the written evidence or none the plaintiff refused to read it. This was in error.

Christian F. Schneider for respondent.

(1) Evidence of guarding of machine after accident was admissible in this case for the purpose of proving the allegation in the petition that it was possible to guard this machine. Brennan v. City of St. Louis, 92 Mo. 462; Bailey v. Kansas City, 189 Mo. 500; Rusher v. City of Aurora, 71 Mo. App. 424; Woods v. M., K. & T. Ry. Co., 51 Mo. App. 503; Walker v. Point Pleasant, 49 Mo. App. 248. (2) The plea of *res adjudicata* is not well taken in this case. Young v. Thrasher, 61 Mo. App. 414; Ketchum v. Thatcher, 12 Mo. App. 185; Zonker v. Mercantile Co., 110 Mo. App. 382; Ramming v. Railroad, 157 Mo. 477. (3) The statements made by Mr. Meyer under oath as a witness in the first suit, in which this defendant was likewise defendant, were competent and admissible. He was the president and manager and therefore representative of the defendant. Padley v. Catterlin, 64 Mo. App. 629; Byrd v. Hartman, 70 Mo. App. 57.

REYNOLDS, P. J.—Action by the father for expenses incurred by him in having his minor son treated at a hospital, for medical and surgical expenses, loss of the services of the son in consequence of his being disabled from injuries received while in the employ of defendant, and which injuries, it is alleged, will render the earning capacity of the son less during the whole period of his minority, and for other expenses incurred in consequence of the injuries to his son, a lad under 16 years of age. Damages are laid at $500, for

Digitized by Google

which judgment was demanded. From a judgment in favor of plaintiff, defendant appealed to the circuit court. The defendant filed no written pleading either before the justice or in the circuit court, but orally denied the averments of the statement filed, and claimed that plaintiff had been guilty of contributory negligence, and that the matter of expenses incurred by the plaintiff and his right to recover for them, had been adjudicated in the case hereafter referred to. Plaintiff recovered a judgment in the circuit court in the sum of $465, the trial being to a jury, from which, interposing a motion for new trial as well as one in arrest of judgment, and excepting to the action of the court in overruling these motions, defendant has duly perfected its appeal to this court.

The case above referred to is that of Anton S. Minea, a minor, by George Minea, his next friend, against this same defendant, 175 Mo. App. 91, 157 S. W. 1006. This is the same accident that was then before our court, the son there suing by his father as next friend. The averments of the petition are substantially as in the statement here filed and save as to the measure of damages there claimed as sustained by the son himself, here by the father for his expenditures and loss of services of the son, they are practically alike. We refer to the report of that case for a full statement of the facts connected with the accident, as also for the law applicable to those facts, deeming it unnecessary to repeat either here. It is proper to state that the case now before us was tried in the circuit court pending the appeal of the former case and before its determination by our court.

We are compelled to reverse the judgment in this present case for errors committed by the trial court "against appellant . . . materially affecting the merits of the action" (R. S. 1909, sec. 2082), the errors consisting in the admission of testimony.

Digitized by Google

It appears that plaintiff is blind. In company with his son, he went to the works of defendant, and one of the officers in charge accompanied him and his son to the place where the machine at which the accident had occurred was located. Plaintiff was asked if he had examined that machine. He said that he had felt over the machine. His counsel repeating the question, "You said you felt of that machine?" was interrupted by counsel for defendant with the objection that there was no evidence that the machine was in the same condition then or was the same machine then that it was at the time of the injury; that this plaintiff cannot tell what he saw or felt; that this is an attempt on the part of counsel for plaintiff to get something indirectly into evidence that is incompetent. To this counsel for plaintiff answered, that defendant had pleaded the general issue, had denied all allegations of the petition; that one of the allegations of the petition and a material one is that the machine could be guarded, and that he expected to show as a matter of fact that it was guarded. Whereupon counsel for defendant excepted to this statement and asked that the jury be discharged. The court declined to accede to this, defendant excepting. Whereupon counsel for plaintiff stated that one of the questions under the statute is whether the machine could be guarded, and if it could be guarded it would be the duty of defendant to guard it; that he took it that if it was guarded, there could not be any better proof of that fact. Counsel for defendant objected to this argument and statement, whereupon the court said: "If it is permissible to prove this machine was subsequently guarded it is not upon the theory that the subsequent conduct of the defendant shows he was guilty of negligence by not having done it before. If it is competent at all it is for the purpose of showing as a matter of fact it was possible to guard the machine. That is all." After some remarks exchanged between court and coun-

Digitized by Google

sel, the court asked counsel for plaintiff what he wanted to prove by this witness. Counsel stated that he wanted to prove by this witness that that machine could be guarded for the reasons already stated. The court: "You may prove by him that he went there and examined it and found it was guarded." Mr. Morrow (for defendant): "After the accident?" Mr. Schneider (for plaintiff): "Yes, I will admit it was after." Whereupon the court overruled the objection to the admission of the testimony, counsel for defendant excepting, and the witness answered that he found the machine guarded at the time he visited it and he described how it was guarded.

It will be noticed that before admitting this testimony the learned trial judge, in passing upon an objection made when it was first offered, did say that if the testimony was competent at all, it was for the purpose of showing as a matter of fact that it was possible to guard the machinery. But he did not direct the jury to that effect. After this remark had been made considerable discussion followed between court and counsel, so that when it was finally admitted there was no ruling made by which the attention of the jury was called to the fact that it was admitted subject to any limitation. Hence while it is the general rule that it is the duty of counsel to ask an instruction limiting testimony admitted to a particular purpose, and that failure to do so is mere nondirection, we do not think that rule is applicable here. When finally admitted, the testimony was admitted without qualification. We are therefore compelled to hold that admitting it in the manner in which it was admitted, and without the court at the time calling the attention of the jury to the fact that it was admitted for a specific purpose only, is reversible error.

In the first Minea case, referring to the one heretofore before our court, very much the same line of testimony was offered, and objection made to it. The ob-

Digitized by Google

jection was sustained. But counsel for appellant in that case contended that notwithstanding this, counsel for respondent had injected remarks that had poisoned the minds of the jury, and had really obtained the benefit of the testimony, although excluded. Passing on this, our court, somewhat incidentally it may be, held that the objection was properly sustained in that case, our court, speaking through Judge ALLEN, saying (l. c. 109): "That such testimony was incompetent there can be no doubt; and we need not repeat the sound reason therefor, which has been so frequently stated. No effort should have been made to place the matter before the jury at all. It was, of course, perfectly proper to show that the machine could be guarded; but that could be shown, and was fully established, by other testimony." Even if this holding was not necessary to the decision of that case, beyond all doubt it was a correct statement of the law as to the non-admissibility of like testimony.

In Jones on Evidence (2 Ed.), sec. 288, it is said that by the great weight of authority, it is held that in actions based on negligence, evidence that the defendant has repaired the alleged defect or adopted some new precaution since the accident, is incompetent.

In 1 Wigmore on Evidence (Ed. 1904), sec. 283, the rule is laid down still more emphatically, that author saying (l. c. page 363): "To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been capable of causing such an injury, but indicates nothing more, and is equally consistent with a belief in injury by mere accident, or by contributory negligence, as well as by the owner's negligence. . . . On this ground, then, namely, that the supposed inference from the act of improvement is not the plain and most probable one, such acts may be excluded."

In Morse v. Minneapolis & St. Louis Ry. Co., 30 Minn. 465, l. c. 468, cited and quoted from at some

Digitized by Google

length by Mr. Jones, supra, in support of the rule he lays down, it is said: "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safe-guards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence." So the English Court of Exchequer has held in Hart v. The Lancashire and Yorkshire Ry. Co., 21 L. T. (N. S.) 261, l. c. 263.

This same rule has been recognized in our courts in several cases. Thus in Ely v. St. Louis, K. C. & N. Ry. Co., 77 Mo. 34, the judgment of the circuit court was reversed solely on the ground that the court had refused an instruction to the effect that it was the duty of the railway company, after the occurrence of a rainstorm which had occasioned a disaster to its embankment to so change or alter its embankment as to provide against a recurrence of similar storms, and that if it appears from the testimony that defendant caused the embankment to be altered or changed for such purpose, such testimony should not be taken into consideration in this case by the jury in determining whether the embankment was properly constructed and sufficient to withstand and turn back, and had withstood and turned back, all floods that had occurred since the construction of the road, or that might reasonably, within the experience of those living in that locality, be expected to occur.

In Hipsley v. Kansas City, St. J. & C. B. Ry. Co., 88 Mo. 348, citing Ely v. Railway Co., supra, it was held that evidence that the defendant, several months after the accident, repaired its road in various places, by putting in new rails and ties, was inadmissible. [See, also, Brennan v. City of St. Louis, 92 Mo. 482, l.

Digitized by Google

c. 488, 2 S. W. 481; Alcorn v. Chicago & A. R. R. Co., 108 Mo. 81, l. c. 90, 91, 18 S. W. 188.]

In Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182, where evidence was admitted of repairs having been made after the occurrence of the accident, as for instance, the repair of sidewalks of a city, it is held that such evidence is admissible only for the purpose of showing that the street was subject to the jurisdiction of the city and was recognized as a public street, if that was an issue in the case. In discussing the admission of like evidence, Judge LAMM, referring to Columbia, etc., R. R. Co. v. Hawthorne, 144 U. S. 202, among other cases, quotes with approval the rule, accepted in that case at page 207, as settled upon much consideration, that the evidence of repairs made after the accident, is incompetent as showing liability for the accident, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, and not only has no legitimate tendency to prove that defendant had been negligent before the accident happened, but is calculated to distract the minds of the jury from the real issue and to create a prejudice against defendant. [See, also, Clonts v. Laclede Gas Light Co., 160 Mo. App. 456, l. c. 476, 140 S. W. 970.]

On these authorities we hold that the admission of this testimony, even in the manner in which it was admitted, is reversible error.

Like testimony was allowed to be given by the son, who, in answer to a question by counsel for plaintiff as to whether there was anything in the operation of the machine that would be interfered with by putting up a board in front of it, answered, "No, sir, it wouldn't, because it has a board up there now, and it don't harm the machine in running." As no motion was made to strike this out, we cannot notice it as reversible error. We note it as tending to show the harmful character of that which was admitted.

Digitized by Google

While this son was being examined as a witness, counsel for plaintiff asked him if he had heard Mr. Meyer, "the president" of the company defendant, testify in the former case, that the machine could have been guarded. Objection was duly made that this was hearsay. The objection was overruled and exception saved. The witness answered, "Yes, sir, I did; he said the machine could be guarded." Counsel for defendant moved to strike this out, as even if he had said that, "it would not change the law, and it invades the province of the jury." This was overruled. Over the objection of defendant this witness was also allowed to testify that he had heard Mr. Meyer testify in that other case, that he was president of the defendant company. The learned trial court, in overruling these objections, stated that these were admissions by one of the officers of the defendant company.

The general rule is that declarations by officers of corporations, to be binding on the corporation, are admissible only when made while acting within the scope of their authority, and as a part of the *res gestae* pertaining to the instant transaction. [Jones on Evidence (2 Ed.), sec. 268; McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285, l. c. 299 et seq.] While by way of what may be called an exception to this rule, it has also been held that declarations of an officer against the company are admissible, when it appears that the officer is one to whom is committed the management of the whole business, or a particular line of that business, that in such case it is not necessary to the admission of such declarations that they should either have been part of the *res gestae* or should have been specially authorized (Phillips v. St. Louis & S. F. R. Co., 211 Mo. 419, l. c. 441, 111 S. W. 109), there is no relaxation of the rule that it is essential that the agency, the official character of the party, must be proved by testimony other than his own declarations. [Jones on Evidence (2 Ed.), sec. 255; Waters-Pierce Oil Co. v.

Digitized by Google

Jackson Junior Zinc Co., 98 Mo. App. 324, l. c. 329, 73 S. W. 272; Griswold v. Haas, 145 Mo. App. 578, l. c. 584, 122 S. W. 781.] The only testimony that the person referred to was president was that of the witness here, who testified that he had heard him say so. That did not prove the official position.

We are not holding that the testimony of the general officer, the president, given in the other case, if it is properly proved that he is such, is not admissible, because hearsay testimony. The rule which excludes hearsay testimony rests mainly on the ground that there had been no opportunity to cross-examine the declarant. [Jones on Evidence (2 Ed.), sec. 336.]

The admission sought to be here used is alleged to have been made when the declarant was being examined as a witness in court in the trial of the case of Anton Sylvester Minea against this defendant. While in that case the son sued through his father as next friend for injuries sustained by the son, here the father sues, not in a representative capacity, as there, but in his own right, for loss sustained by him as father in consequence of the injury to his son. The question of liability of the defendant in either case, turned on the same law and facts, the only difference being the measure of damage. We think that under this condition the testimony given in the one may be given in evidence in the other. The parties are substantially the same. [Jones on Evidence (2 Ed.), sec. 338; Ritchie v. Lyne, 1 Call (Va.) 489; Atlanta & West Point R. Co. v. Venable, 67 Ga. 697; Indianapolis & St. Louis R. Co. v. Stout, 53 Ind. 143, l. c. 158.] Save as to the measure of damages, the issue is practically the same, namely, was this defendant liable for the injuries sustained by the son of the plaintiff here. In this situation, we hold that the testimony in the first action can be used in evidence here, if properly proved. [1 Greenleaf on Evidence (16 Ed.), secs. 163, 163a, pp. 276-8.] As the court correctly ruled, if plaintiff offers to prove that

Digitized by Google

by the testimony as in the bill of exceptions filed, he must read all of it.

Criticism is made of the concluding paragraph of the second instruction given at the instance of plaintiff, and which we quote and italicize, in that it instructs the jury that the burthen is upon defendant to prove by the preponderance of the testimony that plaintiff was negligent at that time, "*and that that negligence caused or contributed to cause said injuries in order to defeat the claim of plaintiff herein.*" It is argued by counsel for appellant that there were many other ways than that here stated by which defendant could have defeated the claim of plaintiff; that could have resulted either by showing that it was not negligent, or by plaintiff failing to prove negligence on the part of defendant. On a new trial this objection can be obviated.

Complaint is made of the action of the court in refusing an instruction that plaintiff cannot recover in this action on account of expenses incurred for medicines, medical attendance and nursing. It is claimed that under the plea of *res judicata* and the evidence introduced of what was tried and determined in the former case, in which damages were sought on the part of the son, suing through his father as next friend, these same expenses had been involved. We do not think that that appears and find no error in the refusal of this instruction. It does not follow that because the son obtained damages for expenses incurred by him, that the father is not entitled to recover for his own expenses incurred. Even if the son recovered for more than he should, the father is not debarred.

We find no reversible errors other than those pointed out.

For those errors, the judgment of the circuit court in this case must be reversed and the cause remanded. It is so ordered. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

HARRY L. YAWITZ, Appellant, v. UNITED RAILWAY COMPANY OF ST. LOUIS, Garnishee, Respondent.

St. Louis Court of Appeals. Argued and Submitted December 4, 1913. Opinion Filed December 31, 1913.

1. **APPELLATE PRACTICE: Conclusiveness of Trial Court's Finding.** Where there are no controverted facts and the trial court's finding is predicated upon an agreed statement of facts, such finding is not conclusive on the appellate court.

2. **GARNISHMENT: Confusion of Names: Liability of Garnishee.** Where a garnishee, under an execution against B. C. Braxton, admitted that it was indebted to C. M. Braxton and that he represented himself to plaintiff as B. C. Braxton when the account sued on was contracted, judgment should be rendered for plaintiff.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

REVERSED AND REMANDED (*with directions*).

Adolph Abbey for appellant.

(1) The issues raised by a denial of garnishee's answer and the reply, if filed, are the sole issues to be tried. Dodge v. Knapp, 112 Mo. App. 513; Holker v. Hennessey, 141 Mo. 527; Bank v. Dillon, 75 Mo. 380; Swartz v. Riner, 66 Mo. App. 476; Brown v. Gummersell, 30 Mo. App. 341. (2) One may be designated in legal proceedings by the name by which he is known, although not his true name. Nolan v. Taylor, 131 Mo. 224; Linton v. First National Bank, 10 Fed. 894; Washington v. State, 68 Ala. 85; Wilson v. State, 69 Ga. 97; Rich v. Mayer, 7 N. Y. Supp. 69. (3) Garnishee, on garnishment execution, is entitled to an allowance for answering only when he is possessed of property or effects of the principal defendant, and when his answer

Digitized by Google

is not denied or excepted to and is true. Sections 2434, 2435, R. S. 1909.

Boyle & Priest and *R. E. Moloney* for respondent.

(1) The respondent was unaffected by the summons of garnishment against it when the name of the defendant was different from that of the person to whom it was indebted, unless it was shown to have had actual knowledge of the fact that its debtor and the person so named were the same. German Natl. Bank of Denver v. Natl. State Bank of Boulder, 5 Colo. App. 427; German Natl. Bank of Denver v. Natl. State Bank of Boulder, 31 Pac. 122; Terry v. Sisson, 125 Mass. 560; Gittings v. Russell, 114 App. Div. 405; White v. Springfield Sav. Institution, 134 Mass. 232; Dutton v. Simmons, 65 Maine, 583; Bowen v. Mulford, 10 N. J. L. 230; Hutchinson's Appeal, 92 Pa. St. 186. (2) The garnishee on garnishment execution is entitled to an allowance of fifteen dollars for answering irrespective of whether or not it has possession of property or effects of the principal defendant. Sec. 2436, R. S. 1909; Ellison v. Ralston, 19 Mo. App. 537; Shotwell v. Markham, 85 Mo. App. 151. (3) Since this cause was tried by the court without a jury, and the appellant asked for no declarations of law or fact, and no declarations of law or fact were given, the appellate court has nothing to determine. Under the circumstances it is immaterial whether the trial court decided on the law or the facts, and the judgment should be affirmed. Rice v. McClure, 74 Mo. App. 383; Jordan v. Davis, 172 Mo. 599; Harrison v. Bartlett, 51 Mo. 170; Hlil v. Kingsland, 131 Mo. 48.

REYNOLDS, P. J.—The appellant brought his action before a justice of the peace against Bert Braxton and Bert C. Braxton. Summons was issued and returned as served. At the return day of the summons,

Digitized by Google

the defendants not appearing, the justice rendered a judgment against them in the sum of $25 and costs of suit. Afterwards a transcript of this judgment was filed in the office of the clerk of the circuit court. Execution issued out of that court and under it the respondent here, United Railways Company, was duly summoned as garnishee. The statutory interrogatories were filed requiring the defendant railway company to answer whether at the time of the service of the garnishment, it had in its possession or under its control, any property, etc., of, or owed "either of the defendants" any money; whether it owed them any now, and if so, how much. The garnishee answered, denying that at the time of the service of the garnishment it had in its possession any property, etc., of, or that it then owed or now owes the defendants Bert Braxton or Bert C. Braxton any sum of money whatever, but further sets out that "C. M. Braxton has been employed by it, but that he has never been known as, nor is he the person or either one of them known as Bert Braxton or Bert C. Braxton." The answer further states, upon information and belief, that the plaintiff in the case had never procured any judgment against C. M. Braxton nor has any writ or other process ever been served on him and that to the best information and belief of the garnishee, C. M. Braxton has never been known by any other name. This was replied to, the reply averring that C. M. Braxton was in the employ of defendant; that defendant owed him; that he was the Bert. C. Braxton referred to and that the garnishee knew that.

The cause was tried to the court, a jury being waived, and without the introducing of any evidence but agreed statements of facts, which are in writing and as follows:

"Jan. 16, 1912.

"It is hereby admitted by the above named defendant, garnishee, that one C. M. Braxton was in its

Digitized by Google

employ from January 19, 1911, up to February 27, 1911, at a salary of —— and was indebted to him in the amount of $68.85. But the defendants are Bert Braxton and Bert C. Braxton.

"Jan. 16, 1912.

"It is hereby further admitted that said C. M. Braxton represented himself to plaintiff herein as Bert C. Braxton, at the time the account sued on was contracted and that plaintiff did not know him by any other name but as Bert C. Braxton.

Jury waived; cause submitted to court.

It appears by these agreed statements that the garnishee admitted, first, that one C. M. Braxton had been in its employ, and that the garnishee was indebted to him in the amount of $68.85; second, that "*said* C. M. Braxton" represented himself to plaintiff as Bert C. Braxton, at the time that the account sued on was contracted. It is true that plaintiff brought his action against Bert Braxton or Bert C. Braxton, naming them as the debtors. The execution runs against Bert Braxton and Bert C. Braxton, "known as C. M. Braxton." The garnishee admits that it is indebted to "one C. M. Braxton" and that "said C. M. Braxton," the identical man in its employ, and to whom it is indebted, is the very man who represented himself to plaintiff as Bert C. Braxton at the time "the account sued on was contracted." In other words, the garnishee admits the identity—that the man in its employ is the same man who represented himself to plaintiff as Bert C. Braxton, with respect to the subject-matter of the action which afterwards proceeded to judgment against him.

Although this case was tried below by the court, without a jury, its finding herein is not conclusive upon

Digitized by Google

us. There were no controverted questions of fact to be passed upon by the court below. The record contains no evidence but the garnishee's solemn admissions which we have set out. The question before the court thereupon became one purely of law; to determine the construction and legal effect of these written stipulations of fact. By those stipulations, the garnishee admitted that C. M. Braxton represented himself to be and that he was Bert C. Braxton. The judgment should have been in favor of the plaintiff and against the garnishee for the amount of the judgment debt, interest and costs, not exceeding the amount admittedly in the hands of the garnishee.

The judgment of the circuit court is reversed and the cause remanded with directions to the circuit court to enter up judgment against the garnishee as above. *Nortoni* and *Allen, JJ.*, concur.

ALTON R. EASTON et al., Appellants, v. HAZEL KIRK DEMUTH et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted December 3, 1913. Opinion Filed December 31, 1913.

1. **WILLS: Construction: Trusts: Active Trusts.** A devise of real estate to testator's son, "in trust for his children, to support and educate them," created an "active trust," in that it required the exercise of discretion by the trustee.

2. **TRUSTS: Active Trusts: Termination.** An active trust, which requires the exercise of discretion by the trustee, cannot be terminated at the will of the *cestui que trust.*

3. **WILLS: Construction: Trusts: Beneficiaries.** The trust created by a devise of real estate to testator's son, "in trust for his children, to support and educate them," being an active

Digitized by Google

trust, a child born to the son after testator's death would be a beneficiary.

4. ———: ———: **Trusts: Title and Duties of Trustee.** Under a devise of real estate to testator's son, "in trust for his children, to support and educate them," the son is only bound to provide reasonably for his children's support and education while they remain in his household, and if they leave his household, as by marrying, or their education is completed, he is not required to further provide for their support from the trust fund, nor is he bound to render an accounting of his expenditures or expenses connected with the fund; the real estate being given to him absolutely, subject only to the trust in the income derived from it, that such income should be used for the support and education of his children so long as they needed to be educated or continued as members of his family.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen,* Judge.

REVERSED AND REMANDED (*with directions*).

Rodgers & Koerner for appellants.

(1) The trust involved is an active trust. Donghy v. Noonan, 176 Mass. 467. Hence, Theodore Demuth Easton, the child born after testator's death, is a beneficiary, and any children of plaintiff hereafter born, if any there be, will be beneficiaries. Carter v. Long, 181 Mo. 701. (2) A father, receiving a bequest in trust for the maintenance of his children, is bound to reasonably provide for their maintenance so long as they remain members of his household, but that is the extent of his obligation. He is not required to account for his expenditures, and so long as he provides reasonable support for his family he performs his full duty and is entitled to retain for his own use any surplus that may remain. The children have no rights except to reasonable support while they remain at home as members of their father's household. Lewin's Law of Trusts (12 Ed.), pp. 157, 158, 159; Perry on Trusts, sec. 118, p. 169; Browne v. Paull, 1 Sim. (N. S.) 92; Hadow v. Hadow, 9 Sim. 439; Leach v. Leach,

Digitized by Google

13 Sim. 303; Carr v. Living, 28 Beavan, 644; Hora v. Hora, 33 Beavan, 88. Respondents have become forisfamiliated, that is, have ceased to reside at home as members of their father's household. Hence, their interest in the trust fund has terminated. Bowden v. Laing, 14 Sim. 111; Staniland v. Staniland, 34 Beavan, 536; Lewin's Law of Trusts (12 Ed.), pp. 157, 158 and 159. Appellant Wright Johnston Easton, though of age, has continued to reside at his father's home as a member of his household. Hence, he is entitled to maintenance out of the trust fund. Scott v. Key, 35 Beavan, 291; Lewin's Law of Trusts (12 Ed.), pp. 157, 158, 159. (3) Respondents, with full knowledge of all the facts, have acquiesced in the trustee's course of dealing with the trust estate for many years. They should not now be heard to complain of that of which they knew and to which they tacitly assented.

John A. Blevins for respondents.

(1) The trust created by the will in question is a direct or express trust, and Alton R. Easton, the trustee, acquired no beneficial interest in the trust property. Foster v. Friede, 37 Mo. 37; Chase v. Chase, 2 Allen, 101; Loring v. Loring, 100 Mass. 340; 1 Perrine on Trusts (3 Ed.), secs. 117-120; Woodruff v. Woodruff, 54 N. Y. App. Div. 414. (2) Theodore Demuth Easton acquired no beneficial interest in the trust property in question, but whether he did or not is entirely immaterial to the issues presented herein. Carter v. Long, 181 Mo. 701. (3) The trustee having misappropriated part of the trust property and intermingled the trust moneys with his own, and being insolvent and unable to give a bond, is subject to removal by a court of equity. Gaston v. Hayden, 98 Mo. App. 683; Lowe v. Montgomery, 117 Mo. App. 273; Davis v. Hoffman, 167 Mo. 573; Gartside v. Gartside, 113 Mo. 348.

Digitized by Google

STATEMENT.—The last will and testament of one Alton R. Easton, of the city of St. Louis, contained this clause: "I give and devise to my son, Alton R. Easton, of the city of Sedalia, State of Missouri, the following described real estate in the city of St. Louis," (describing the property.) "The above described property is left in trust for his children to support and educate them." The testator died December 11, 1893. At the time of his death, his son, Alton R. Easton, appellant here, had four children, two daughters, Emeline and Hazel, and two sons, Alton R., Jr., and Wright, all minors at the death of their grandfather. After the death of the grandfather, another son, Theodore, was born to Alton R. Easton. Mr. Easton took charge of the property, improved real estate, and collected the rents thereon, mingling them with his own funds and using them in ordinary family expenses, his five children, parties here, residing with him. In January, 1898, he filed a petition in the circuit court of the city of St. Louis, under the above caption, making all of his surviving children defendants and asking for authroity to borrow money on the property. Authority was granted. Afterwards and in this same case, he prayed for authority to sell the property. Authority was granted and a sale made at the price of $6500. Deducting the amount due on the property for the loan, taxes, etc., there remained the net sum of $3124.80, which, on July 8, 1908, he deposited with the clerk or registry of the court, it possibly drawing interest. From time to time Mr. Easton submitted reports of his recepits and disbursements, which were approved by the court. In April, 1909, he petitioned the court for leave to withdraw the fund that he might invest it in real estate in Sedalia; he also asked for an allowance for various expenditures and for money for the support and education of his two children, Wright and Theodore, who were living with him. The application of the father to withdraw the fund and invest it in real estate

Digitized by Google

in Sedalia was denied. Thereupon he filed a petition for leave to invest the fund in approved security. In February, 1910, the daughters Emeline and Hazel, both married, and the son Alton, Jr., filed a petition in this cause in the circuit court to require Mr. Easton, as trustee, to make a report in writing of the property and money received and collected by him as trustee and to account therefor, and charging mismanagement and appropriation and incompetency, as well as failure to make full reports of his receipts and disbursements, and averring that their father had not paid over their share to them or accounted for it, asked that he be required to report his receipts and disbursements during the sixteen years he had controlled the property; that he set forth the names of all persons from whom he had received any rents, interest or other proceeds from the trust estate, giving dates and amounts, and also set out the names of persons to whom disbursements have been made out of the trust fund, as well as the dates and amounts, showing the amounts paid to each beneficiary, or on their account, with dates of payments; that in connection with such report he be required to file all receipts and vouchers for payments by him, and that on the filing of the account and report the same be referred to a commissioner to examine it, and that he, Alton R. Easton, be removed as trustee and that a reliable trust company be appointed as trustee to take charge of the fund and reinvest it for the use of the beneficiaries of the trust, they claiming to be of the beneficiaries.

In answer to this, Mr. Easton, stating that since the deposit of the $3124.80 with the clerk of the court, he had never drawn any sum therefrom, asked for an allowance out of that fund for the education of his minor son, and a further allowance for the son who is living with him. The court denied this application and entered up an order requiring Mr. Easton to forthwith make a report in detail of his administration of the

Digitized by Google

fund, as requested by the three defendants, and overruled his application for an allowance. Mr. Easton failing to file the account as ordered, the court entered up a finding that the conduct of Mr. Easton as trustee was disapproved, that he be removed as trustee, the court appointing another "as trustee" in his stead. From this Alton R. Easton and his sons Wright and Theodore, filing motions for new trial, have duly appealed to this court.

In the course of the hearing on the application for an accounting and removal, testimony was taken from which it appears that at the time of the death of the testator, his son Alton R., one of the appellants here, was about forty years of age and married. His first wife dying, he remarried. He also had other children than here named, born of the second marriage. Whether this second wife was living at the time of the trial, or when the two children died, does not appear. Mr. Easton was about fifty-seven years of age in 1911. It further appears that until married, the daughters Hazel and Emeline had been members of their father's household, had been maintained by him in the ordinary manner of children by their parents; so had the son, Alton, Jr., until, when about twenty years of age, he left the home and has since supported himself. The other two sons, Wright, about twenty-four years of age, and Theodore, a minor, are now members of the family and household of their father, the latter still attending school at the expense of his father. It further appears that Mr. Easton is now and always has been a man of very moderate means; at the time of his father's death and from that time on has apparently depended on a salary. He kept no books of his expenditures on account of his children but had accounts of his receipts. As long as he was deriving any income from the property he had used it for ordinary expenses of the family, as the family was constituted

Digitized by Google

from time to time, and for the education of his children.

REYNOLDS, P. J. (after stating the facts).—The foregoing is not a very full statement of the long proceedings in this case, it having been in court ever since 1898, and many orders entered in it, but is thought to be sufficient to an understanding of the real issue involved in this appeal. That is, the nature of the title or estate which Alton R. Easton took under the clause of the will of his father which we have set out above.

Counsel for appellants claim that the trust here created is an active trust. Counsel for respondents refer us to 1 Perry on Trusts (3 Ed.), secs. 117 to 120, in support of their claim that this clause creates a direct or express trust. Counsel for appellants, as well as those for respondents, cite us to Carter v. Long, 181 Mo. 701, 81 S. W. 162, in support of their several contentions. Consideration of that case and of the authorities referred to in it, leads us to the conclusion that the trust created by this clause of the will before us, falls into the class of active trusts. It is an active trust in that it is one "requiring the exercise of discretion on the part of the trustee. Therefore it is not to be terminated at the will of the *cestui que trust.* Claflin v. Claflin, 149 Mass. 19; Young v. Snow, 167 Mass. 287." [Danahy v. Noonan, 176 Mass. 467.]

Being an active trust, Theodore Demuth Easton, the child born after the testator's death, is a beneficiary, as would be any other children of Alton R. Easton which may be hereafter lawfully born to him. Carter v. Long, supra, commencing at foot of page 709.

It is well to say here that outside of the above cases as to the character of the trust, very few cases of like character have come before our American courts —none before the courts of our own State. So that in passing upon the incidents of an estate or trust of like character as that before us, we have had resort to

Digitized by Google

the English decisions where like cases have often been determined. It is true that counsel for respondents refer us to Woodruff v. Woodruff, 54 N. Y. App. Div. 414, l. c. 417; Chase v. Chase, 2 Allen (Mass.), 101, and Loring v. Loring, 100 Mass. 340, but we do not think that on their facts, on the terms and construction of the wills and on the character of the legacies there considered, they are applicable to the case at bar.

Taking up the consideration of this clause of the will, and treating it as creating an active trust, the father receiving the property in trust for the support and education of his children, is bound to provide reasonably for their support and education, only so long as they remain members of his household and are to be educated. If they leave the home, if they cease to be of the household of the father, especially if a son or daughter marry and set up a separate household; if their education, so far as intended, is completed, he or she is no longer entitled, in law, to look to the parent for support or education out of the fund; is no longer to be considered as falling within the class of those provided for in this clause, "for it can scarcely be supposed that the testator meant an income given with reference to one establishment, to be split in as many different incomes as there are children." [Lewin's Law of Trusts (12 Ed.), p. 159, sec. 14.]

In Bowden v. Laing, 14 Simons, *113, it is said (l. c. *115): "When the income of property is given, as it is in this case, to the mother, for the maintenance of herself and her children, what is intended is, that she shall receive the whole of the income, and shall maintain the children out of it so long as they form part of her family. But when they are forisfamiliated, they lose the right to maintenance." It is further there held that on the marriage of one of the daughters, her right to maintenance ceased and that on the death of the other daughter, the mother was entitled to have the property transferred to her absolutely.

Digitized by Google

That leaving the family destroys the right to participate in a fund providing for the support of the children by the parent, is also held in Staniland v. Staniland, 34 Beavan, 536.

In Wilson v. Bell, 4 L. R. Chan. App. 581, the clause in the will construed is very like the one before us. It was held by the court that the devise is in the nature of "a gift on a condition, or a trust." The court held that one of the children, whose maintenance was provided for in the will, having left the home of her parent of her own accord, had put it out of the power of the one holding the gift or trust to perform the trust any longer as to her, and was not entitled to claim any benefit of the gift.

So that as to the two daughters and the son Alton, who had left the paternal home, they are out of the terms of the devise, gift or trust and have no further interest in it.

Nor is Mr. Easton, even treating him as a trustee, bound to account for the income or its expenditure, it not being contended that he had not supported and educated his children while residing with him, properly and according to his ability. In point of fact, ever since July 8, 1908, when he deposited the fund with the clerk of the court, he appears to have provided for his family out of his own means and without drawing on the fund.

"In cases where a trust for the maintenance of children is implied, the person bound by the trust is regarded in the same light as a guardian of a lunatic or of a minor; he is entitled to receive the fund, and can give a valid receipt for it; and so long as he discharges the trust imposed upon him, he is entitled to the surplus for his own benefit, nor is he obliged to account for the past application of the fund. And the future application is very much according to his discretion, provided he educates and supports the children reasonably, according to their position in the world

Digitized by Google

and the intention of the testator." [1 Perry on Trusts (3 Ed.), sec. 118. To the same effect, see Lewin on Trusts, sec. 13, p. 158.]

In Browne v. Paull, 1 Simons (N. S.), 92 (republication 1851), it is said by Vice Chancellor Cranworth (l. c. 103): "Where the interest of the children's legacies is given to a parent, to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children." Referring to the conditions of the gift or legacy, the Vice Chancellor (l. c. 104) uses language which is particularly appropriate to the case before us, saying: "It is always extremely improbable that a testator can mean that the parent shall keep an accurate account of all money expended in the maintenance and education of a child, forming, as that child ordinarily does, part of the parent's establishment. The great probability always is that nothing more was intended than that the parent should adequately maintain and bring up the child." One of the authorities relied upon by the Vice Chancellor for this conclusion is Hadow v. Hadow, 9 Simons, *438. There one of the provisions in the will was that until certain stocks and funds should become payable to the sons of the testator, the dividends thereof should be paid over by his trustees into the hands of the testator's wife, "to be by her applied, or, in case of her death, to be applied, by my said trustees or the survivors or survivor of them, for and towards the maintenance, education and advancement in life of my said sons or the survivor of them in such manner as she or they shall think proper." Vice Chancellor Shadwell, who rendered the opinion in the Hadow case, construing this, held (l. c. 442) that the testator meant that his widow and children should live together and that during her life she should have the income of the

Digitized by Google

children's property to maintain them without being liable to account, and it was accordingly ordered that the mother, the widow, was entitled to this income, she maintaining and educating her sons in the proper manner.

In Hora v. Hora, 33 Beavan, 88, the testator had given all of his real and personal estate to his wife and eldest son, upon trust, "to apply the rents, profits and income of the aforesaid properties to the maintenance, education and support of all his children by his present and former wife, until his youngest child attained the age of twenty-one years." The children asked for an accounting of the income and of the application thereof between certain years named. The Master of the Rolls held that it appearing that the children had been maintained, educated and suported, he could direct no accounting; that "if anyone is dissatisfied with the application of the income until the youngest child attained twenty-one, he ought to have made out some special case. There is no suggestion that the children have not been properly maintained and supported, and I cannot direct this account." So it was held in Carr v. Living, 28 Beavan, 644.

In Scott v. Key, 35 Beavan, 291, it is held that where the bequest was to the widow of two-thirds of the residue of the estate, to be at her sole and entire disposal for the maintenance of herself and such child or children as the testator may have by her, that the widow had an uncontrolled power over the income so long as the children were maintained and that the right of the children to maintenance did not cease at twenty-one years, provided they continued to live with their mother.

On the authority of these cases, we hold that the father's right to this fund is absolute and that he is not bound to render an accounting of his expenditures or expenses connected with the fund. We have no doubt whatever that the intention of the testator, to be

Digitized by Google

gathered from his will, was to provide a fund to aid the father, charged, if not burdened, with the support of a number of children, from the income of which he might be better able to perform that task; to aid him in the support and education of his children, as long as those children were dependent upon him for their support and education and remained of his household. He was under no obligation to account to them or to anyone, for his receipts or expenditures in this behalf, and is entitled to hold the fund, which out of a mistaken view, he turned into court, and which is now on deposit with the court.

We are confirmed in the view we take of this case by consideration of the will in its entirety. The clause we have quoted and considered above is the first clause in the will. Following that are devises to his son Archibald and his daughter Alby, of parcels of real estate. Then follows a devise to his two sons, Daniel and George, jointly, of a certain other lot of ground. The next clause directs his executors to appraise all of his personal property and permit his children to select such articles as they may desire for which each of them "shall be charged with the appraised value of the personal property selected by each," and that all other personal property not so selected shall be sold and the proceeds thereof divided into five equal parts, giving one part to each of his five children. The concluding clauses provide for the erection of a monument to his memory and the appointment of his son George and one Merry as executors.

We have no description in the record of the real estate left to the four children other than Alton, nor evidence of its value, but it is fair to assume that the testator aimed to make a fair and equal distribution of his estate among all of his five children. If the will is to be interpreted as giving his eldest son, Alton R., his namesake, the mere usufruct of the parcel of land devised, and that usufruct especially devoted to

Digitized by Google

the maintenance and education of his (Alton's) children, then this son was not on an equality with his sister and brothers and was very greatly discriminated against. Considering the will as a whole, we gather no such intention. As we construe this clause, the fee of the lot is in Alton R. Easton, subject only to the trust, not in the lot, but in its income; that he should use the income for the support and education of his children as long as they needed to be educated and as long as they have their domicile with him; continue members of his family.

It follows that the action of the circuit court in requiring an accounting by Alton R. Easton, the appellant here, in removing him as trustee, in appointing a new trustee in his stead, was without authority and is contrary to the spirit and intent of the will of Alton R. Easton, the testator.

Nor should the circuit court longer retain the custody of the fund either in the hands of its clerk or of the receiver appointed by it, but should direct that the fund and its accretions, if any, be turned over to the appellant, Alton R. Easton, to be by him held in conformity with the provisions of the will of his father.

The judgment of the circuit court is accordingly reversed and the cause remanded, with directions to that court to enter up a decree as herein provided and to dismiss the cause from further consideration in that court, taxing all the costs and expenses of the proceedings which have accrued upon and since the filing of the petition here by the respondents against the respondents. *Nortoni* and *Allen, JJ.*, concur.

Digitized by Google

INDEX.

By T. E. Francis.

(Cases are inserted in the order received by publisher.)

"ACCIDENT." See **Physicians and Surgeons, 7.**

ACCIDENT INSURANCE.

Accidental Death While Passenger: Construction of Policy. A policy insuring against loss of life from injuries caused exclusively by external, violent, and accidental means, received while riding as a passenger in a place regularly provided for the transportation of passengers within a surface or elevated railroad car, does not cover a death resulting from an attempt to board a moving car. Mitchell v. Accident Co., 1.

ACTIONS. See **Partnership, 1.**

Joint or Several Recovery. Where the petition charges a joint tort against several defendants, a recovery may be had against one defendant only, or against all. Boehm v. Electric Co., 663.

ADMINISTRATION. See **Executors and Administrators.**

ADMINISTRATORS. See **Executors and Administrators.**

ADMISSIONS. See **Corporations, 5, 8, 9; Evidence, 15, 16.**

AGENCY. See **Principal and Agent.**

APPELLATE PRACTICE. See **Bills of Exceptions; Constitutional Questions, 1; Corporations, 6; Crimes and Punishments, 1; Damages, 9; New Trial; Pleadings, 6, 9, 10; Trial Practice, 7; Writ of Error Coram Nobis.**

1. **Crimes and Punishments: Appellate Practice: Duty of Court to Examine Record.** On appeal from a judgment of conviction in a criminal prosecution, it is the duty of the court, under Sec. 5312, R. S. 1909, to examine the record for error, notwithstanding appellant fails to file a brief. State v. Powell, 7.

2. **Conflicting Evidence: Question for Jury: Review.** The credibility of the witnesses and the weight of their testimony are for the jury, and none the less so because the evidence preponderates in favor of one party; and if there is substantial evidence tending to support the theory advanced by the party recovering, it suffices, and a finding thereon is conclusive. Reeves v. Lutz, 61.

Digitized by Google

APPELLATE PRACTICE—Continued.

3. **Trial Practice: Objections to Evidence.** A general objection to the reception of evidence is not a sufficient predicate for an assignment of error, on appeal, if such evidence was competent for any purpose; and this is especially true where the objection amounts to no more than that the evidence is immaterial. Reeves v. Lutz, 61.

4. **Cross Appeals: Disposition: Affirmance on One Count and Reversal on Another: Disposition of Case.** In an action for personal injuries, where a verdict was rendered for plaintiff on one count of the petition and for defendant on the other count, and, on appeal, the verdict for plaintiff was upheld and the verdict for defendant was set aside, *held* that the cause should be remanded to the trial court with directions to hold the verdict for plaintiff in abeyance until a verdict is rendered on the other count and then render a final judgment covering both counts. Ib.

5. **Writ of Error: Judgments: Insane Person.** The office of a writ of error is to nullify judgments, proper on the face of the record, but improper by reason of facts not appearing by the record. And it may be invoked to annul a judgment taken against an insane person. Gibson v. Pollock, 188.

6. **Abstract: Instructions: Counter Abstract: Affidavits.** If an appellant's abstract presents instructions as those given for respondent and the latter does not object to them by filing a counter abstract, they will be accepted by the appellate court as correct; and affidavits that they are not those given at the trial will not be considered. Goode v. Coal Co., 207.

7. **Admissibility of Evidence: Prerequisites to Review.** A mere refusal of the trial court to hear an answer is not alone sufficient to constitute error, but it is the duty of the party alleging error to indicate what the evidence is which he proposes to elicit. Ronchetto v. Coal Co., 215.

8. **Scope of Review: Appeal Without Motions for New Trial or in Arrest.** Where no motion for new trial or in arrest is filed, the appellate court can only examine the record proper. And in such case the court cannot disturb the judgment except for fatal error apparent on the face of the record such as that the court had no jurisdiction of the subject-matter or of the parties or that the petition wholly fails to state a cause of action. Mere defects or irregularities not going to the very life of the judgment will not, in such case, be passed upon. Masonic Temple Co. v. Young, 278.

9. **Necessity of Raising Point Below.** A point not clearly and directly raised and preserved in the trial court but raised for the first time in the appellate court, will not be noticed on appeal. George v. Railroad, 283.

10. **Binding Effect of Theory of Trial.** Where the entire record shows that the case was tried on both sides upon the theory that the place of the accident was on a publicly traveled street of the city and no contention was made that it was not, the case will not be reversed because there is no evidence specifically and expressly saying it was a street of the city. Best v. St. Joseph, 330.

11. **Abstract to Contain What: Rule.** Court rule number 15, which provides that the abstract of the record shall "set forth so much

Digitized by Google

APPELLATE PRACTICE—Continued.

of the record as is necessary to a full and complete understanding of all the questions," is not complied with by a reference therein to the original bill of exceptions. Steel Co. v. Cottengin, 392.

12 **New Trial: Trial Court's Discretion.** It is largely discretionary with the trial court whether or not it will grant a new trial on the ground that the verdict is against the weight of the evidence; and only when such discretion has been clearly abused should it be interfered with. Cornell v. Insurance Co., 420.

13 **Same: Verdict Against Weight of Evidence: Elements Necessary to Conclusion.** On a motion for a new trial on the ground that there is no evidence to support the verdict, to sustain such verdict it is necessary that the evidence should not be contrary to physical fact or so impossible or improbable as to be unbelievable and it must be substantial and possess some probative force when taken in connection with all the facts and circumstances; but all reasonable inferences to be drawn from the facts proven, stand for evidence. Ib.

14. **Same: Trial Court's Discretion.** That a trial court, in weighing the evidence for and against the verdict, concludes that the evidence for the verdict is so light as to be of no consequences, were there no evidence contradictory, does not prevent that court from also finding that the opposing evidence outweighs it and warrants setting aside the verdict on the ground that the evidence does not support it. Ib.

15. **Excessive Recovery: Prerequisites to Review.** The question as to the excessiveness of the verdict will not be considered, on appeal, unless complaint of the amount of the verdict is made in the motion for a new trial. Manufacturing Co. v. Investment Co., 447.

16. **Review of Question Whether Pleading is Departure: Prerequisites.** Where an amended statement is filed in the circuit court, on appeal from a justice's court, the original statement filed in the latter court, being an abandoned pleading, cannot be considered by the Court of Appeals, unless it is preserved in the bill of exceptions, and hence, where it is not so preserved, the question as to whether the amended statement was a departure cannot be considered. Meux v. Haller, 466.

17. **Conclusiveness of Verdict.** The appellate courts are not permitted to disturb a judgment on the ground that the verdict is against the weight of the evidence; the only question on this score that is open to review being, whether there is any substantial evidence to support the verdict. Lazerine v. Lazerine, 476.

18. **Appealable Orders.** An appeal will not lie from the exercise of a plaintiff's right to voluntarily dismiss the suit after he has appealed to the circuit court from an adverse judgment of a justice of the peace; Sec. 2038, R. S. 1909, which provides that any party to the suit aggrieved by any judgment of the circuit court may appeal, not giving defendant any such right of appeal, since he cannot be said to be "aggrieved." Leonard v. Building Co., 480.

Digitized by Google

APPELLATE PRACTICE—Continued.

19. **Conclusiveness of Trial Court's Finding.** In an action at law tried by the court, where no instructions are given or refused, the finding will not be disturbed, on appeal, if it can be sustained on any theory supported by the evidence. Bank v. Phillips, 488.

20. **Same.** In a case tried to the court, where no instructions are given or refused, the finding will not be disturbed, on appeal, if it can be sustained on any theory supported by the evidence. Dunham v. Casualty Co., 558.

21. **Same.** A finding by the trial court on conflicting evidence is conclusive, on appeal. Curtis v. Dry Goods Co., 578.

22. **Conclusiveness of Verdict.** A verdict on conflicting evidence is conclusive, on appeal. Van Hoeffen v. Taxicab Co., 591.

23. **Binding Effect of Theory of Litigants.** In an action against a taxicab company, although there was no proof that it was a common carrier, yet, in view of the fact that the case was tried in the trial court and presented in the appellate court by both parties on the theory that it was a common carrier. the appellate court will dispose of it on that theory. Fornoff v. Taxicab Co., 620.

24. **Conclusiveness of Trial Court's Finding.** Where, in a case tried to the court without a jury, no instructions were given or requested, the judgment should be affirmed, on appeal, if supported by any view of the evidence, as all presumptions and intendments go in aid of it. Book Co. v. Anderson, 631.

25. **Binding Effect of Theory at Trial.** In an action for the price of goods sold and delivered to an agent of a branch house of defendant mercantile company, where there was evidence that the agent had authority to order the goods and bind defendant for the price, and the court, at the request of defendant, charged that before plaintiff could recover, the jury must believe that the order was within the scope of the agency, or that defendant subsequently ratified the act of the agent, defendant was bound by an adverse verdict. Drug Co. v. Grocer Co., 676.

26. **Conclusiveness of Verdict.** The weight of the evidence is for the jury, and a verdict sustained by evidence and approved by the trial court is conclusive, on appeal. Ib.

27. **Binding Effect of Theory at Trial: Corporations.** Where the petition did not aver that defendant corporation was the successor of the corporation primarily liable for the cause of action counted upon nor that it had taken over the assets or assumed the liabilities of such other corporation, but the case was tried on the theory that defendant was liable because of such assumption and evidence tending to substantiate it was introduced by plaintiff without objection on the part of defendant, it was proper for the court to submit the case to the jury on such theory. Zachra v. Mfg. Co., 683.

28. **Reviewing Sufficiency of Evidence: Complete Abstract of Evidence Required.** Where appellant stated in his abstract of the record that he had printed only such parts of the evidence as were relevant to the questions presented for decision, the

Digitized by Google

APPELLATE PRACTICE—Continued.

appellate court was not required to consider the sufficiency of the evidence to support the judgment, since appellant, with whom the duty lay to present it to the appellate court, omitted to present all of it. Ib.

29. **Review of Admission of Evidence: Limiting Instruction.** The general rule that it is the duty of counsel to ask an instruction limiting testimony to a particular purpose is not applicable where, in an action by an employee for injuries sustained from an unguarded machine, evidence that the machine was guarded after the accident, offered for the purpose of showing that it could have been guarded, was erroneously admitted by the court without calling the attention of the jury at the time to the fact that it was admitted for such specific purpose only. Minea v. Cooperage Co., 705.

30. **Review of Admission of Evidence: Prerequisites.** In order to secure a review of the admission of evidence volunteered by a witness, it is essential that a motion be made at the trial to strike it out. Ib.

31. **Conclusiveness of Trial Court's Finding.** Where there are no controverted facts and the trial court's finding is predicated upon an agreed statement of facts, such finding is not conclusive on the appellate court. Yawitz v. R. R., 718.

ASSAULT AND BATTERY. See **Carriers of Passengers, 1, 11, 12, 13, 14, 15, 17, 19; Insane Persons, 2, 3, 5; Writ of Error Coram Nobis, 5.**

1. **Negro Porter: Passenger.** Where a negro porter standing outside coaches of a waiting train makes offensive remarks to a passenger making inquiry as to which coach he should enter and, after some words starts to assault the passenger, when the latter resists and a fight ensues, the carrier is liable in assault and battery. Smith v. Delano, 242.

2. **Same: Damages Actual and Punitive.** In an action for assault and battery by a negro porter on a passenger making inquiry as to which car he should enter, $500 punitive damages are not excessive. Ib.

ATTORNEY AND CLIENT. See **Evidence, 10.**

AUTOMOBILES.

Negligence: Frightened Horse. The plaintiffs, who are husband and wife, sued to recover damages for the death of their infant child, which was thrown out of the buggy in which they were riding, when the horse became frightened at the defendant's automobile. The defendant's car made a sudden appearance at the crest of the hill on a public road, running at a rapid speed in a cloud of dust, and the horse though accustomed to automobiles, became uncontrollable and the plaintiffs were thrown out of the buggy and the child was killed. *Held*, that it is the duty of the autoist to use the highest degree of care that a very careful person would use under like circumstances to prevent injury or death to persons on or traveling over such public roads. Roberts v. Trunk, 358.

BAILMENTS. See **Principal and Agents, 11; Pledges.**

Digitized by Google

BILLS OF EXCEPTIONS. See Appellate Practice, 16.

Change of Judge: New Circuit. A case was tried by the regular judge of the circuit court for the county and time given the defeated party to prepare his bill of exceptions. Before that time expired and before the bill was signed the county, by act of the Legislature, was taken out of the trial judge's circuit and put into a new circuit organized by the act, the Governor appointing a judge for such new circuit. The trial judge signed the bill and it was *held* he had no authority to do so; that the new judge was his successor and the proper official to sign it. State ex rel. Schenk v. Flick et al., 236.

BILLS AND NOTES. See Chattel Mortgages, 3; Special Tax Bills, 5, 6, 7.

1. **Uncertain as to Amount of Time of Payment: Promissory Notes: Negotiability.** Under the provisions of the Negotiable Instruments Act, Secs. 9972 and 9973, R. S. 1909, a note is not made non-negotiable by reason of the fact that it contains a provision for attorneys' fees and for an extension of time of payment without notice; but, in the absence of such statute, either of such provisions would destroy its negotiability. Davis v. McColl, 198.

2. **Non-negotiable Instrument: Endorser's Liability.** The mere writing of his name on the back of a non-negotiable instrument does not make one liable as an endorser. There must be proof of the agreement under which the endorsement was made and that it was for a sufficient consideration. Consequently, the mere introduction in evidence of a non-negotiable note will not make out a case against an endorser, even if proof is made of his signature. Ib.

3. **Locus of Contract.** A note made in a foreign State and payable there is a contract of that State, and the liability of parties thereon is to be determined by the law of that State. Ib.

4. **Pleading: Variance: Failure of Proof.** The petition counted on a note bearing interest from date at eight per cent per annum until paid. The note introduced in evidence was of the same date and for the same amount as described in the petition, but provided for interest at eight per cent from date until maturity and at eight per cent from maturity until paid, payable monthly, and that if interest was not paid when due, it should become principal and bear the same interest. *Held*, that the note introduced in evidence was not so utterly inconsistent with the note alleged as to disprove the cause of action alleged or amount to a total failure of proof, within Sec. 2021, R. S. 1909. Bank v. Phillips, 488.

5. **Alteration: Sufficiency of Evidence.** In an action on a promissory note, evidence for plaintiff to overcome defendant's proof as to alteration of the note *held* to be substantial and sufficient to make the alleged alteration after delivery a question for the trial court sitting as a jury. Ib.

BONDS

1. **Original Undertaking or Mere Surety: Liability of Obligors.** The defendants came into possession of a publishing company which had a lease on a building, the ground floor of which had been placed on a level three feet above the street

Digitized by Google

BONDS—Continued.

grade to suit the peculiar needs of the publishing company. The owner of the building had been given a lien on a printing press to secure the performance of the terms of the lease. Defendants desired to sell the press, and, in order to obtain a release of the lien, gave a bond to the owner of the building to pay the cost (to the extent of $2500) of restoring the ground floor to the street level should the lease be terminated or no new tenant be secured at the end thereof who would use the building with the floor thus raised. At the end of the term no new tenant could be secured who would use the building with the floor thus raised above the street level. Plaintiff reduced the front third of the floor to the street level, the second third was lowered a part of the way and the rear one third was left as it was. The expense of doing this was much less than if she had lowered the entire floor to the full street level, but was greatly in excess of the amount of the bond. She then sued defendants on the bond. *Held*, that the bond was an original undertaking on the part of defendants, and they are not mere sureties for the publishing company; that their liability thereon is not *strictissimi juris;* and that plaintiff's failure to lower the entire floor did not release the obligors. Minor v. Woodward, 333.

2. **Same.** A surety may contract as a principal and by doing so will renounce the right of setting up a defense arising out of the relation of principal and surety. Ib.

BOYCOTT.

What is. A boycott involves the idea of conspiracy and unlawful confederation on the part of several persons to injure the business of another. In re Heffron et al., 639.

BUILDING CONTRACTS.

1. **Meaning of Terms: "Furring:" Evidence.** A contract for the erection of a school building required plaintiff to furnish furring for plaster ceilings, metal plaster partitions and metal lathing, and also declared that building terms used should have the meaning given them in a particular dictionary of architecture. The definition of the word "furring" in such work was: "A light framework or simple strips, generally of wood, but sometimes of metal, applied to walls, beams or similar surfaces, to support sheathing, plaster or other form of finish. Its purpose is either to give a more even structure for application of such finish, or to form an air space behind such finish, or to give a semblance of constructive form, as the imitation of a vault, by means of some plastic material carried on a frame of the necessary shape." *Held*, that the definition was itself ambiguous, and hence it was proper to admit expert evidence to determine whether such word included steelwork attached to trusses consisting of strips or bars of steel three inches wide by three-eighths of an inch thick and weighing approximately three pounds to the foot, to which other strips of light "channel iron" were tied to sustain metal lathing and plaster finish. [REYNOLDS, P. J., dissents.] Manufacturing Co. v. Investment Co., 447.

2. **Damages: Recovery for Partial Performance: Amount of Recovery.** In an action by a subcontractor who was prevented by the contractor from completely performing his contract, *held*

Digitized by Google

BUILDING CONTRACTS—Continued.

that a verdict for an amount bearing the same ratio to the total contract price as the amount of work done by plaintiff bore to the entire work contracted for, was not excessive. Manufacturing Co. v. Investment Co., 447.

3. **Same.** Where a subcontractor was prevented by the contractor from completely performing his contract, he could not recover for the work performed in an amount in excess of the contract rate, although there was evidence that the reasonable value of the work performed was greater than the contract rate. Ib.

CARRIERS OF PASSENGERS.

1. **Liability of Carrier for Assault of Passenger.** Where a negro porter standing outside coaches of a waiting train makes offensive remarks to a passenger making inquiry as to which coach he should enter and, after some words starts to assault the passenger, when the latter resists and a fight ensues, the carrier is liable in assault and battery. Smith v. Delano, 242.

2. **Boarding Moving Car at Elevated Station: No Fault Attributable to Motorman.** Where the same track at an elevated station was used by cars going in the same direction but to different destinations, so that only those desiring to board a particular car would attempt to do so, the fact that a person is standing on the platform when a car approached is not sufficient to charge the motorman with notice that such person is intending to or will board the car when no signal or other intimation to that effect is given the motorman and the car does not stop but proceeds on its way. In such case, after the car has passed the regular stopping point for the discharge of passengers at such station, the motorman has a right to presume that the rear gate of the car is closed according to rule and that he can safely resume the usual speed attained between stations. To require the motorman to know that such person would, under such circumstances, attempt to board the car, when every intimation was to the contrary, would be requiring superhuman powers of him. Speaks v. R. R., 311.

3. **Same: Evidence.** Even if, by an answer to a question containing in its terms the location of the front end of the car with reference to the point at which a person was said to be standing on the platform, a witness appears to say that such person was standing by the side of the track as the front end of the car passed, so that the motorman saw or might have seen him, yet, where all the testimony of such witness shows clearly that the person was not standing at such point as the front end passed, but came upon said platform after the front end had passed the point in question, such answer to said former question will not be treated as being any substantial evidence of such fact. Ib.

4. **Same: Contributory Negligence.** Deceased went up a stairway to an elevated street railway station platform, thirty feet above the ground, shortly after midnight and sprang upon the rear step of a moving car that was leaving the platform. The motorman had no means of knowing that he would do so. The attempt to board the car was made within ten feet of a guard rail at the edge of the platform which came to within nine inches of the passing car. On the guard rail was a sign warning persons not to board the car while in motion. The gate to the vestibule of the car was closed or nearly so.

Digitized by Google

CARRIERS OF PASSENGERS—Continued.

Deceased got one foot on the step and the other on the vestibule floor and was holding on to the gate with one hand, to the handrail of the car with the other, his body outside of the gate. In this perilous position he fell or was struck and thrown to the pavement below. *Held*, that he was guilty of contributory negligence as matter of law and could not recover. And that aside from the element of contributory negligence there was no showing on the part of the motorman on which the case rested. Ib.

5. **Same: Boarding a Slowly Moving Car.** While it is not negligence as matter of law for an able bodied man to board a slowly moving car, and that question is usually one of mixed law and fact to be determined by the triers of the facts under instructions of the court, yet, this rule applies only in cases where the act is not attended by unusual and extraordinary dangers. It has no application where one boards a moving car upon an elevated platform at midnight within a few feet of the edge where is a guard rail or fence likely to strike and hurl him to the ground. Ib.

6. **Same: Proximate Cause of Fall.** The contention that deceased's negligence was not the proximate cause of the injury because it was sudden jerking of the car that caused him to fall and not his negligence in boarding it cannot be maintained where all the evidence shows that deceased never at any time attained to a safe position upon or in the car but at all times was in an exceedingly perilous situation which was brought about by his boarding the car under such dangerous circumstances. Ib.

7. **Relation of Carrier and Passenger: Where Such Status Arises.** Even in the case of a street railway there must be circumstances from which can be implied an offer to be carried on the part of the one desiring to become a passenger, and an acceptance on the part of the carrier before the relationship can be said to exist. If these do not appear the relation of carrier and passenger does not arise. The mere fact that one runs toward and jumps upon a moving street car does not create the relation in the absence of any showing of acceptance on the part of the carrier or of an invitation to board the car. Ib.

8. **Same: Duty Owed to One Not a Passenger.** As the deceased did not obtain the status of a passenger, the only duty defendant owed him was to use ordinary care to avoid injuring him after it was discovered, or should have been discovered, that voluntarily and uninvited, he had placed himself in a place of danger. Ib.

9. **Taxicab Company.** A taxicab company following the business of transporting persons for hire and holding itself out to carry one and all is a common carrier of passengers, and is subject to all the liabilities of such a carrier. Van Hoeffen v. Taxicab Co., 591.

10. **Protection of Passengers: Duty of Carrier.** It is the duty of a carrier of passengers to protect passengers from insult and assault by its own servants and by outsiders; its obligation with respect to protecting him from insults and assaults at the hands of its own employees being that af an insurer. Ib.

Digitized by Google

CARRIERS OF PASSENGERS—Continued.

11. **Assault of Passenger: Right of Recovery: Authority of Chauffeur.** It is not essential to a recovery by a taxicab passenger, assaulted by and arrested on the request of a driver who had charge of the cab and was authorized to collect fares, that he show that the driver was acting within the scope of his authority, since the acts of the driver constituted a breach of the carrier's duty to protect the passenger against insults and assaults by its employees. Van Hoeffen v. Taxicab Co., 591.

12. **Same: Continuing Assault.** In cases of a continuing assault or restraint of liberty of a passenger by a servant of the carrier, initiated on or within the conveyance and continued after the passenger has alighted from it, the law will not undertake to determine whether the acts of the servant committed after the passenger had alighted were beyond the scope of his authority, but will treat the whole matter as having occurred while the passenger was under his care, so as to impose liability on the carrier for all such acts. Ib.

13. **Same.** Where the driver of a taxicab, who was in charge of the cab and authorized to collect fares, held a passenger prisoner in the cab for some time until he was finally able to force open the door and alight, and then caught and held him prisoner on the street, and caused him to be arrested and detained until an excessive fare was paid, the assault was a continuing one, beginning with the imprisonment in the cab. Ib.

14. **Existence of Relation.** The rule, that the relation of carrier and passenger is ended when a carrier maintaining no station stops its vehicle and the passenger alights therefrom on a public street is not applicable where the passenger is not permitted to remove his belongings from the vehicle or to depart therefrom free from insult or injury at the hands of the carrier's servants; and hence where the driver of a taxicab held a passenger prisoner in the cab for some time until he was finally able to force open the door and alight and then caught and held him prisoner on the street and caused him to be arrested and detained until an excessive fare was paid, and refused to allow him to remove his grip from the cab, the relation of passenger and carrier existed during all that time. Ib.

15. **Protection of Passengers: Duty of Carriers.** A passenger is entitled to proper and decorous treatment from the carrier during the course of his transportation, and the carrier is liable if its servants assault or insult him during such time. Fornoff v. Taxicab Co., 620.

16. **Evidence of Relation.** The mere fact that a passenger leaves the conveyance during the transit does not, in and of itself, terminate the relation of the parties, provided he does so for a proper purpose, and especially is this true if he leaves the conveyance only temporarily, with the consent of the carrier's servant in charge. Ib.

17. **Assault of Passenger: Right of Recovery.** Where a passenger in a taxicab of a common carrier entered a business establishment to procure change with which to pay the driver, and the driver followed him for the purpose of collecting the fare, the relation of passenger and carrier continued to exist, so that the carrier was liable for an assault committed on the passenger by the driver under such circumstances. Ib.

Digitized by Google

CARRIERS OF PASSENGERS—Continued.

18. **Creation of Relation.** Where one takes passage on the conveyance of a common carrier with a purpose to beat his way, he is a mere trespasser and is not entitled to the care and protection due a passenger. Ib.

19. **Existence of Relation: Action for Assault: Instructions.** In an action for an assault alleged to have been committed on a taxicab passenger by the driver, where there was evidence that plaintiff entered the taxicab with the intention of refusing to pay fare, it was error to refuse instructions requested by defendant, predicated on such evidence, presenting the issue that the relation of carrier and passenger never existed, and was error to give instructions for plaintiff assuming that the mere engagement of the taxicab by plaintiff created that relation and ignoring the evidence tending to prove that plaintiff never intended to pay fare. Ib.

CAVEAT EMPTOR.

1. **Judicial Sales: Void Sales.** The rule of *caveat emptor* at all judicial sales is in force in Missouri; but it does not apply to sales which are void. Chilton v. Harris, 267.

2. **Same: Quitclaim Deed: Void Deed: Liability of Vendor.** A purchaser at a judicial sale must beware and has no protecting warranty, his purchase being like a purchase by quitclaim deed from an individual. But this does not apply to a void sale, and though one purchasing by quitclaim deed is not entitled to reimbursement if there be no title conveyed, yet he is entitled to a *valid* deed and if it be void he may have redress on *that* account. Ib.

3. **Same: Mistake of Law: Independent Action.** There may be relief on account of the payment of money under mistake of fact, but not in an independent action, for mistake of law, if there is no fraud. Ib.

4. **Same.** While one may not have a right of action for mistake of law, in an independent suit, yet if, under a void execution sale, he makes a purchase, he may go into court in *that* action and have relief. Ib.

CHATTEL MORTGAGES. See **Mortgages and Deeds of Trust.**

1. **Conversion: Repair: Possession.** A sewing machine company sold to a purchaser a machine and took a note, secured by chattel mortgage on the machine for the balance of purchase money payable on demand. All was paid but balance of $8. The purchaser delivered the machine to the company to be repaired. The company repaired it but refused to deliver back to the purchaser until the balance on the note then past due, be paid. The purchaser then brought action in conversion for the value of the machine. It was *held* that the company had the right to hold possession and conversion would not lie. Thompson v. Machine Co., 276.

2. **Same.** A mortgagee in a chattel mortgage has the legal title after default in payment of the note secured, and is entitled to the possession. And the fact that he obtained that possession for the purpose of repairing the chattel does not deprive him of the right to refuse to redeliver until payment is made. Ib.

Digitized by Google

CHATTEL MORTGAGES—Continued.

3. **Demand: Refusal of Possession.** A note payable on demand secured by chattel mortgage will be considered to be demanded by the refusal of the mortgagee to deliver possession of the chattel unless the note is paid. Thompson v. Machine Co., 276.

4. **Release of Lien: Acceptance of Other Security.** The owner of notes secured by liens on personal property agreed with the mortgagor to release the liens, if the latter would sell the property at public auction and pay the notes out of the proceeds of such sale. The property was accordingly sold for more than the amount due on the notes and a part of the proceeds was paid by the clerk of the sale to the owner of the notes, who applied a portion of said amount to the payment of an unsecured open account, which he had against the mortgagor. The latter asserted that the proceeds of the sale in excess of the amount due on the notes belonged to and should be paid to him. This action followed. *Held*, that the special interest of the owner of notes in the property securing the notes was satisfied by the sale and he must look to the trustee for the fund he elected to accept as security in lieu of his liens. Love v. Scott, 351.

CIRCUITS COURTS.

1. **Proceedings Presumed to be Regular.** The circuit court being a court of general jurisdiction proceeding according to the course of the common law, all necessary presumptions are usually indulged in favor of its proceedings, if it appears that the orders or judgments involved were entered or given in a case in which the court had jurisdiction of the subject-matter and of the parties. In re Heffron, 639.

2. **Same.** A circuit court, being a court of general jurisdiction, is presumed to have acted correctly. Zachra v. Mfg. Co., 683.

CITIES. See **Municipal Corporations.**

COMITY. See **Conflict of Laws.**

CONFLICT OF LAWS. See **Bills and Notes, 3; Garnishments, 1, 2.**

Comity. The courts of one State commonly recognize the laws of another State, where the general policy of the two States on the subject is the same. Wine & Liquor Co. v. Coal & Mining Co., 93.

CONSPIRACY. See **Boycott; Injunctions, 12; New Trial, 5, 8.**

Action Against Officers of Labor Union: Burden of Proof. In an action against the business agent and other officers of a labor union for conspiracy, by threatening plaintiff's employer with a strike, unless he discharged plaintiff, as a result of which plaintiff lost his job, plaintiff had the burden of proof throughout to show that the other defendants conspired with, or were responsible for, or ratified, the business agent's acts. Clarkson v. Garvey et al., 9.

CONSTITUTIONAL LAW. See **Injunction, 17.**

Digitized by Google

CONSTITUTIONAL QUESTIONS. See **Foreign Judgments.**

Time for Raising: Appellate Practice. In order for one to avail himself of a constitutional right which has been denied, he must raise the question at the first opportunity; and hence where an appellant, in his motion for rehearing filed in the Court of Appeals, alleged that if the judgment of affirmance rendered by the court should stand, appellant would be deprived of its constitutional rights, a constitutional question was not presented for determination, since that question could and should have been raised when the judgment was rendered in the trial court. Zachra v. Mfg. Co., 683.

CONTEMPT. See **Habeas Corpus, 2, 3; Injunctions, 13, 20.**

CONTINUANCES.

1. **Preventing Continuance by Admissions.** Where, to avoid a continuance, the evidence of an absent witness as set forth in the application is admitted as and for his evidence, it is not proper to inquire during the trial as to the diligence used to have the witness present nor as to the motive of the party using the evidence in not having the witness present nor of the witness in not attending, such matters being immaterial. Wilt v. Hammond, 406.

2. **Same: What May be Shown.** It is proper to show on cross-examination of a party who applies for a continuance because of an absent witness, the evidence as set forth in the application being admitted as the evidence of the absent witness to avoid continuance, that the absent witness was in the employ of the applicant, for the purpose of showing the interest of the witness. Ib.

CONTRACTS. See **Bills and Notes, 3; Building Contracts; Principal and Agent, 10; Sales, 1.**

1. **Parol Evidence: Varying Written Contract.** All prior conversations and negotiations with respect to the subject-matter of a contract in writing are, in the absence of fraud, accident or mistake, merged in the contract. Goller v. Oil and Supply Co., 48.

2. **Modification: Action for Breach.** A contract may be modified after it is executed, by varying its terms, or by adding new terms; but, in such a case, a recovery for a breach is to be had upon the original contract and the subsequent modification, declared upon as a whole. Ib.

3. **Parol Modification.** A written contract may be modified by a new parol contract subsequently entered into. Ib.

4. **Parol Evidence: Varying Written Contract.** In an action on a written contract, parol evidence of an additional agreement, varying the terms of the written contract, made contemporaneously with it, is not admissible, except where the contract reveals on its face that it is incomplete with respect to the additional term sought to be supplied by the parol evidence. Ib.

5. **Same.** In an action for the discharge of an employee, who was employed to sell oil for defendant under a written contract

Digitized by Google

CONTRACTS—Continued.

which required him to sell at the market price, where defendant pleaded justification for the discharge, in that plaintiff had sold oil under the market price, by giving his customers a certain rebate out of his commission, *held* that evidence offered by plaintiff, to the effect that defendant agreed at the time the written contract was executed, and prior thereto, to permit him to give a rebate to his customers out of his commission, was incompetent, for the reason that it was a contradiction of the terms of the written contract. Goller v. Oil and Supply Co., 48.

6. **Action for Breach: Pleading: Variance.** In an action for the breach of a written contract, a recovery cannot be had for a breach of the written contract as modified by a parol agreement subsequently made. Ib.

7. **Modification: Consideration.** A consideration is required to support a new contract which modifies the terms of an existing contract. Ib.

8. **Breach of Contract of Sale: Damages.** Where one enters into a contract to buy a tract of land for a certain definite sum, and one payment is made on the signing of the contract, he is entitled to recover the amount so paid when the seller refuses to comply with the contract after demand has been made on him. Davis v. Creamer, 374.

9. **Parol Evidence: Varying Written Contract.** In order to make parol evidence of a term of a contract inadmissible, the written contract must be complete on its face, free from ambiguity and not contradictory of itself. Steel Co. v. Cottengin, 392.

10. **Written: Ambiguity: Parol Evidence to Explain.** Instance of a written contract which is so ambiguous as to admit oral evidence of the circumstances and reasons for making the contract and showing the true understanding and meaning of same. Ib.

11. **Waiving Strict Compliance Temporarily: Effect as to Future.** A strict compliance with some of the terms of a contract may be waived, for the time being, by the parties thereto without such parties binding themselves to a continuance of such waiver; and they may, on a reasonable notice, demand a strict compliance with the terms of the contract in the future. Wilt v. Hammond, 406.

12. **Changes or Additions: Must be Consideration for.** A contract cannot be modified or changed, nor can new conditions be added thereto, without a new consideration. Ib.

13. **Promise Consideration for Promise: Must be Mutuality.** While one promise is a consideration for another, yet there must always be mutuality as to such promises to make the contract valid and binding. Ib.

14. **Consideration: What Sufficient: Mutuality.** While the annulling of a previous contract or the substitution of a new one for it or the acting on the new contract as modified, may be a sufficient consideration to support a new or modified agreement, yet such cancelling, substitution or acting on the new contract must apply to both parties or affect the contract with reference to both. Ib.

Digitized by Google

CONTRACTS—Continued.

15. **Breach of: Measure of Damages.** In an action for damages for breach of contract to sell ice to plaintiff, for retail trade, where it was not possible or practicable to buy ice on the market so as to lessen the damages, the measure of damages would be the loss of profits under proof of the proper facts as to the certainty of such loss. Ib.

16. **Validity of Assent: Ignorance of Provisions.** That a party who signed a contract to pay a certain amount in installments for a course of instruction did not know that it required him to pay such sum, was no defense to an action for that amount, in the absence of fraud, accident, or mistake, although he was a foreigner and unable to read the English language, in which the contract was written, since a person competent to contract is conclusively presumed to know the contents of a contract he signs, which presumption is not rebutted by the fact that he did not read it, for, if he is able to read it, he must do so, and if not, it devolves upon him to have some one else read or explain it to him. Book Co. v. Anderson, 631.

17. **Same.** That a person who executed a contract for a course of instruction was told by his foreman in the factory where he worked that it was a good thing, was no defense to an action for the stipulated price of the course, where it did not appear that the foreman represented plaintiff or that the contract was secured as a result of duress imposed by the foreman. Ib.

18. **Failure to Accept Services: Right of Recovery: Damages.** Where a contract for a course of instruction, to be paid for in installments, provided that the whole amount unpaid should be recoverable from defendant in event of default in the payments, and plaintiff performed part, and repeatedly offered to perform the balance, of the conditions imposed by the contract, but defendant refused to accept the same, plaintiff could recover the full price after all the installments were past due, although defendant had not received the full course of instruction. Ib.

CONVERSION. See **Chattel Mortgages, 1.**

Evidence: Relevancy. In a suit by defendant's divorced wife to recover the value of personal property which she claimed he had converted, but which defendant claimed he had given to her conditionally, retaking it because she did not comply with the conditions, *held* that evidence as to plaintiff's private affairs and the business conducted by her and defendant prior to her receiving the property, was properly admitted in support of plaintiff's theory that the property was purchased with funds accumulated by the joint efforts of both of the spouses, and was given to plaintiff unconditionally, because of her services. Lazerine v. Lazerine, 476.

CONVEYANCES. See **Caveat Emptor; Chattel Mortgages: Mortgages and Deeds of Trust.**

1. **Contradiction of Consideration Clause: Parol Evidence.** Recitals of a deed as to the consideration are not a part of the contract, and parol evidence is admissible to explain, vary, or even contradict them; but the general rule is, that such evidence is not admissible where it will invalidate the deed or annul its covenants. Laundry Co. v. Freudenstein, 175.

Digitized by Google

CONVEYANCES—Continued.

2. **Contradicting Implied Covenants Against Incumbrances: Parol Evidence.** In view of the fact that the words "grant, bargain and sell" in a general warranty deed, when unrestrained by any express terms contained in the deed, are, under Sec. 2793, R. S. 1909, to be construed as a covenant against incumbrances, parol evidence tending to show that, in addition to the consideration recited in the deed, the grantee agreed to assume and pay taxes which were then a lien on the land, was inadmissible, since its admission would have limited or restrained the statutory implied warranty. Laundry Co. v. Freudenstein, 175.

CORAM NOBIS. **See Writ of Error Coram Nobis.**

Insanity: Assault: Pleading. In a petition for a writ of error *coram nobis* to set aside a judgment rendered against him for assault and battery on a trial when he was insane, if it is alleged that he was insane at the time of the trial and judgment, it is not necessary to also allege that he was insane when he committed the assault. Gibson v. Pollock, 188.

CORPORATIONS. **See Estoppel, 2; Evidence, 15; Pleadings, 1.**

1. **Questioning Corporate Existence: Pleading.** Sec. 1985, R. S. 1909, declaring that the fact of incorporation need not be proved unless put in issue by affidavit filed with the pleadings, does not make the affidavit part of the answer, but, in order to raise the question as to the corporate existence of plaintiff, it is necessary that the answer contain a denial of such existence. Manufacturing Co. v. Milling Co., 87.

2. **Relation of Directors to Stockholders.** Corporations are, in a way, partnerships; and their directors are more than mere agents for fellow stockholders, they being trustees for fellow stockholders, in charge of a trust fund. Sanitary Co. v. Reed, 164.

3. **Liability on Quantum Meruit.** As concerns directors, the acts of a corporation may be proved in the same manner as the acts of individuals, and a promise to pay the reasonable value of services rendered and accepted may be implied against corporations as against individuals. Ib.

4. **Right of Employee to Compensation: Quantum Meruit.** One, who though he was at one time titular secretary and treasurer of a corporation, was neither a director nor a stockholder, but was merely a hired employee, could recover the reasonable value of his services, if rendered at the request, by the direction, or with the knowledge, of the company's officers, directors, or managers, and accepted by them, and not voluntarily rendered without expectation of reward, notwithstanding a resolution of the board of directors that all salaries should end with the end of the current year, since the rule that officers and directors of corporations may not charge for services, unless founded on a resolution of the board or provided for in the articles, constitution, or by-laws, does not apply to one who is neither a director nor stockholder; and hence, although the introduction of such resolution in evidence, in an action against the corporation for the reasonable value of his services, *prima facie* deprived him of any claim to compensation, he should have been permitted to show that he was not included in it,

Digitized by Google

CORPORATIONS—Continued.

but that he did the work with the consent, on the employment, and with the knowledge, of the company's officers and directors. Ib.

5. **Powers of Officers: Admissions.** The president and secretary of a corporation can make admissions against it. Hay v. Fire Clay Co., 567.

6. **Assuming Liabilities of Other Corporation: Pleading: Variance.** Where the petition did not aver that defendant corporation was the successor of the corporation primarily liable for the cause of action counted upon nor that it had taken over the assets or assumed the liabilities of such other corporation, but the case was tried on the theory that defendant was liable because of such assumption, evidence tending to substantiate it was at most a variance, and did not amount to a failure of proof, and appellant would not be heard to urge the variance as error, on appeal, in as much as it did not object to the introduction of such evidence nor file an affidavit of surprise, as required by Sec. 1846, R. S. 1909. Zachra v. Mfg. Co., 683.

7. **Taking Over Assets of Other Corporation: Liability of Transferee.** A corporation which takes over the business of another corporation and succeeds to its franchises and property, and is, in short, the same entity under another name, is liable, even at law, for the liabilities of the other corporation. Ib.

8. **Evidence: Admissions of Officers.** The general rule is, that declarations by officers of corporations are admissible against it only when made while acting within the scope of their authority and as a part of the *res gestae* of the particular transaction. Minea v. Cooperage Co., 705.

9. **Same: Proof of Official Character.** The agency or official character of an officer of a corporation must be proved by evidence other than his own declarations, in order to make his declarations in the course of his employment admissible against the corporation. Ib.

COSTS. See **Depositions, 4, 5, 6, 7, 8: Liability Insurance, 1.**

COURT OF APPEALS. See **Appellate Practice; Constitutional Questions, 1.**

COURTS. See **Appellate Practice; Circuit Courts; Court of Appeals; Justices' Courts; Jurisdiction.**

CRIMES AND PUNISHMENTS. See **Appellate Practice, 1; Injunction, 13; Larceny; Local Option.**

1. **Appellate Practice: Duty of Court to Examine Record.** On appeal from a judgment of conviction in a criminal prosecution, it is the duty of the court, under Sec. 5312, R. S. 1909, to examine the record for error, notwithstanding appellant fails to file a brief. State v. Powell, 7.

2. **Evidence: Hearsay.** Where one testifies over the objection of the defendant concerning a conversation that took place with a prosecuting witness out of the hearing of the defendant, it is error, because it is not part of the *res gestae*, but was *res inter alios*. State v. Johnson, 344.

Digitized by Google

DAMAGES. See Contracts, 8, 15, 18.

1. **Husband and Wife: Loss of Consortium: Evidence.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant, evidence by the husband as to the pain suffered by the wife was admissible, since it would be difficult to establish his damages without evidence of the pain suffered by the wife as a result of which he was deprived of his marital rights. Reeves v. Lutz, 61.

2. **Evidence.** The law never requires pecuniary proof with reference to a non-pecuniary loss. Ib.

3. **Husband and Wife: Loss of Consortium: Evidence.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant, evidence that the wife was disabled from performing the duties of a housewife and that the husband was obliged to employ another woman to keep house for him warranted the submission of the value of such services to the jury, although there was no direct proof of such value. Ib.

4. **Instruction on Measure of Damages: Waiver of Generality.** Where the instruction on the measure of damages is correct in its general scope, defendant waives the right to complain of its generality if he does not ask for a limiting instruction. Ib.

5. **Husband and Wife: Loss of Consortium: Excessiveness of Verdict.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant surgeon in treating a wound left by a surgical operation performed by defendant *held* that a verdict for $1500 was not excessive. [REYNOLDS, P. J., *dubitante.*] Ib.

6. **Assault: Excessiveness of Recovery.** In an action for assault and battery by a negro porter on a passenger making inquiry as to which car he should enter, $500 punitive damages are not excessive. Smith v. Delano, 242.

7. **Building Contracts: Recovery for Partial Performance: Amount of Recovery.** In an action by a subcontractor who was prevented by the contractor from completely performing his contract, *held* that a verdict for an amount bearing the same ratio to the total contract price as the amount of work done by plaintiff bore to the entire work contracted for, was not excessive. Manufacturing Co. v. Investment Co., 447.

8. **Same.** Where a subcontractor was prevented by the contractor from completely performing his contract, he could not recover for the work performed in an amount in excess of the contract rate, although there was evidence that the reasonable value of the work performed was greater than the contract rate. Ib.

9. **Excessive Recovery: Remittitur.** An award of excessive damages may be cured by remittitur. Lazerine v. Lazerine, 276.

10. **Conversion: Excessiveness of Recovery.** In an action for the conversion of diamonds, *held* that a judgment in favor of plaintiff for $800 was not excessive. Ib.

Digitized by Google

DAMAGES—Continued.

11. **Personal Injuries: Instructions.** In an action for personal injuries, an instruction that if the jury found for plaintiff, they should assess his damages at such an amount as would be a fair compensation for the injuries, if any, received by him, and that, in estimating the amount, the jury might consider the character of plaintiff's injuries, whether they were permanent, the bodily pain suffered, if any, and any bodily pain plaintiff would likely suffer in the future, by reason of injuries received, the reasonable value of time lost, if any, etc., was not vulnerable to the objection that it failed to limit the future bodily pain for which plaintiff was permitted to recover to such as would be the direct result of the injuries sustained. Pendegrass v. R. R., 517.

12. **Same.** In an action for personal injuries, an instruction that if the jury found for plaintiff, they should assess damages in his favor for "any bodily pain and anguish he will likely suffer in the future, if any," was not erroneous because of the use of the word "likely." Ib.

13. **Same: Impairment of Earning Capacity in Future: Pleading.** In an action for personal injuries, the petition alleged that plaintiff's limbs were partially paralyzed and that by reason thereof plaintiff had suffered and would continue to suffer great mental anguish and bodily pain, had been unable to do any business or follow his usual avocation whereby he formerly earned a living for himself and family, and had been all the time since his injury and still was unable to do or perform any manual labor, and was totally and permanently disabled. On objection by defendant that the petition did not plead loss of earnings in the future as an element of damage and that it was therefore improper to permit an award of damages therefor, *held* that it has never been the practice, in actions for personal injuries, to aver special damages will accrue in the future from impairment of earning capacity (following Scholl v. Grayson, 147 Mo. App. l. c. 664); *held, further*, that, in any event, the allegation that plaintiff had been unable to follow his usual avocation, coupled with the allegation that the cause which produced that result was permanent, was sufficient to permit a recovery for this element of damage (following Ingles v. Railroad, 145 Mo. App. l. c. 247). Ib.

14. **Same: Excessiveness of Verdict.** Plaintiff fell to the bottom of the pit of a pump house, causing a permanent injury to the lower part of his spine. He was confined to his bed forty-four days, and after this went about on crutches for a time. Physicians testified that he had a chronic disease of the nerve substance of the spinal cord, that it was progressive and permanent, and that he would not be able to do any manual labor. He had previously earned from $45 to $55 per month. *Held*, that a verdict awarding him $6000 was not excessive. Ib.

DEATH BY WRONGFUL ACT. See **Automobiles, 1.**

Action for Death by Private Conveyance: Recovery Under Sec. 5425: Erroneous Instructions: Penal Statute. Where an instruction includes Sec. 5425, R. S. 1909, which relates to the penal feature of the statute, it is erroneous as applied to a private conveyance. Roberts v. Trunk, 358.

DEEDS. See **Conveyances.**

Digitized by Google

DEEDS OF TRUST. See **Mortgages and Deeds of Trust.**

DEFINITIONS. See **Building Contracts, 1; Injunction, 18; Physicians and Surgeons, 7; Railroads, 8; Special Tax Bills, 2.**

Frontage. The term "frontage" is but an expression of the front foot rule and under such rule no other property than that abutting on the street improved can be assessed. Construction Co. v. Investment Co., 229.

DEPOSITIONS.

1. **Nonsuits: Depositions: Right to Require Witness to Sign: Effect of Dismissal of Cause.** After the dismissal of a case, the court has no power to enforce an order on a witness whose deposition had been taken, to show cause why he should not be required to sign the same. Curtis v. Dry Goods Co., 578.

2. **Right to Take: Statute: "Conditionally."** The word "conditionally" in Sec. 6384, R. S. 1909, providing that any party to a suit pending in any court in the State may obtain the deposition of any witness, to be used in such suit, conditionally, relates to the use of depositions, and not to the right to take them. Ib.

3. **Time of Taking.** Under Sec. 6384, R. S. 1909, and the other statutes relating to the taking of depositions, depositions may be taken after a suit is instituted and before the issues are made up. Ib.

4. **Costs.** The cost of taking depositions, as authorized by Sec. 6384, R. S. 1909, and cognate statutes, may be taxed against the losing party. Ib.

5. **Same: Transcription: Statute.** Under Sec. 6403, R. S. 1909, providing that the examination of a witness whose deposition is taken shall be reduced to writing or taken in shorthand and transcribed in writing in the presence of the person or officer before whom it is taken, the cost of reducing a deposition to writing or of transcribing the shorthand notes may be taxed as costs in the suit. Ib.

6. **Same: Agreement of Counsel.** Where plaintiff's counsel, in accepting service of a notice to take depositions, stipulated that they might be taken in shorthand and transcribed, it was proper (even aside from Sec. 6403, R. S. 1909, authorizing such taxation, to tax the cost of transcribing the shorthand notes against plaintiff, who subsequently dismissed the suit. Ib.

7. **Same: Estoppel.** Where, in pursuance of a conspiracy between plaintiff and witnesses whose depositions were taken by defendant, the witnesses refused to sign their depositions, whereupon the court made an order to show cause why they should not sign them, but, before the return day thereof, plaintiff dismissed the suit, depriving the court of power to proceed under the order, the fact that the depositions were not signed and filed did not prevent the taxation of the costs thereof against plaintiff; he being estopped by his actions from complaining on that score. Ib.

8. **Same: Estoppel.** Where, in pursuance of a conspiracy between plaintiff and witnesses whose depositions were taken by de-

Digitized by Google

DEPOSITIONS—Continued.

fendant, plaintiff evaded service of a subpoena to give her deposition, the entire costs of the depositions of such witnesses were taxable against plaintiff, upon her subsequent dismissal of the suit, although a part of the examination of the witnesses was devoted to the ascertainment of plaintiff's whereabouts. Ib.

9. **Right to Take Deposition of Adverse Party.** The mere fact that a defendant desires the deposition of the plaintiff to aid in preparing his defense is not enough to defeat the right to take it, under Secs. 6356 and 6361, R. S. 1909, provided it appears that it is taken in good faith for a legitimate use—that is, for actual use at the trial. Ib.

DOMESTIC RELATIONS. See **Husband and Wife.**

ELECTIONS.

Notice: Statute. It is not necessary, under Secs. 7238 and 7240, R. S. 1909, that the notice of an election shall be addressed to the persons qualified to vote at the election. State v. Johnson, 344.

EMPLOYERS' LIABILITY INSURANCE.

1. **Policy Construed: Right to Incur Expense for Surgical Relief.** An employer's liability policy provided that insured should not incur any expense, other than for imperative surgical relief for an injured employee at the time of the accident. *Held*, that it would seem that "imperative surgical relief" involves not only the calling of a surgeon to administer temporary relief while the injured employee is unconscious, but also involves treatment administered during the ensuing two or three days to abate swellings and set fractured bones and ascertain the extent of the injuries through the use of the X-ray. Dunham v. Casualty Co., 558.

2. **Powers of Adjuster.** An adjuster of an employers' liability insurance company, authorized to ascertain the extent of the injuries, to take steps to minimize the loss, and to settle the claim, has sufficient power to authorize insured, whose employee was injured, to continue to provide medical services for him. Ib.

3. **Recovery of Surgeon's Fees: Condition Precedent.** Under a provision of an employer's liability policy, that no action shall lie against insurer for any loss or expense, unless brought by insured to reimburse him for loss or expense paid after a trial of the issues, or unless the payment shall have been made with the written consent of insurer, it is a condition precedent to a recovery of expenses incurred by insured that the payment be not made until after a trial of the issues, or with the written consent of insurer. Ib.

4. **Waiver of Conditions Precedent.** A provision of an employer's liability policy, that no action shall lie against insurer for any loss or expense, unless brought by insured to reimburse him for loss or expense paid after a trial of the issues, or unless the payment shall have been made with written consent of insurer, being for the benefit of insurer, may be waived by it, so that where an insured paid the bill of a surgeon, whose

Digitized by Google

EMPLOYERS' LIABILITY INSURANCE—Continued.

services had been authorized by insurer's adjuster, without his having brought suit for it and without the written authorization of insurer to pay it, but insurer, after insured had demanded reimbursement, mailed him a check for a smaller amount, as though it was liable therefor, it waived compliance with the conditions precedent set out in said provision. Durham v. Casualty Co., 558.

EQUITY. See Injunction.

1. **Principal and Surety: Satisfaction of Judgment.** When a creditor knows that one occupies the relation of surety to the principal debtor and notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken and which he otherwise would have taken, he is discharged. Lewis v. Smith, 348.

2. **Same: Worthless Check.** The mere acceptance by the creditor of a worthless check given by the principal obligor will not discharge the sureties when it is not shown and does not appear that the securities were injured. Ib.

3. **Cancellation of Deed: Suretyship.** The plaintiff instituted this action in equity to cancel a certain deed of land, which is in reality a mortgage executed by the grantor as surety for the payment of a debt of another. *Held*, that anything that would discharge a surety from personal liability to pay the debt of his principal would discharge his property from a lien securing his contract of suretyship. Hardwicke v. Barnes, 386.

4. **Same.** Where a mortgage is given to secure the debt of another, for which the mortgagor assumes the liability of a surety, any change in the form of a debt or the terms of payment, as by renewal, extension of time, or otherwise, not assented to by the mortgagor, will discharge the mortgagor, unles the mortgage itself contains provisions authorizing such arrangements to be made. Ib.

5. **Same: Statute of Limitations.** In an equitable action, prosecuted by the holder of an equitable title, to quiet title is in the nature of a real action which could be barred only by ten years adverse possession, the statute does not begin to run until the dispossession of the equitable holder. Ib.

ESTOPPEL. See Depositions, 7, 8.

1. **Pleading.** Ordinarily, an estoppel, to be availed of, must be pleaded. Manufacturing Co. v. Milling Co., 87.

2. **Action on Appeal Bond: Estoppel to Question Corporate Capacity of Plaintiff.** Plaintiff, in the caption of the petition, was described as a corporation, but no averment concerning its corporate existence was set forth in the body of the petition. Defendant appealed from a judgment for plaintiff, and gave an appeal bond in favor of plaintiff. Defendant did not raise the question as to the corporate existence of plaintiff or its right to sue as a corporation; but, in an action on the appeal bond, after the judgment had been affirmed, the surety (who was the attorney for defendant) sought to defend on the ground that plaintiff was not a corporation, but the name used

Digitized by Google

ESTOPPEL—Continued.

by plaintiff was merely the trade name of a copartnership. *Held*, that, notwithstanding estoppel was not pleaded, the surety should, in furtherance of justice, be held to be estopped to set up such defense. Ib.

3. **Taking Advantage of Own Wrong.** A party may not avail himself of the benefits ensuing from his own wrong. Curtis v. Dry Goods Co., 578.

EVIDENCE. See **Bills and Notes, 2; Building Contracts, 1; Carriers of Passengers, 3; Contracts, 1, 3, 4, 5, 9, 10, 16; Conversion, 1; Conveyances, 1, 2; Corporations, 3, 5, 8, 9; Crimes and Punishments, 2; Damages, 1, 2, 3; Depositions; Fraternal Beneficiary Associations, 14; Insane Persons, 5, 6; Negligence, 33; Physicians and Surgeons, 10; Principal and Agent, 1, 4, 9; Writ of Error Coram Nobis, 5, 6.**

1. **Statute of Foreign State: Judicial Notice.** Judicial notice cannot be taken of the statutes of a foreign State when they are issuable facts in a controversy. Formal proof must be made of them as of any other fact, and it is immaterial that the court may be possessed of independent knowledge of such foreign laws. Davis v. McCall, 198.

2. **Same: Application of Law of Forum.** In suits on a foreign contract it is only where there is neither proof nor ground for presumption as to what the law of such foreign State is, that the court is justified in applying the laws of the forum. Ib.

3. **Law of Foreign State: Common Law: Presumption.** Whenever it appears or is shown that a law is in force in a foreign State, the presumption is, that it continues in force until the contrary is shown. Consequently, if the foreign State is one in which the common law was established, prior to its admission into the Union, by statutes or governmental acts within the judicial notice of the court, and no proof is made as to the foreign law, the court is required to presume that the common law having been once in force there, has continued and is still in force. Ib.

4. **Same: States not Subject to the Common Law: Lex Loci Contractus.** It is only in respect of those States which were never subject to the common law, prior to their admission into the Union, that, in the absence of proof as to the *lex loci contractus*, the court will apply the statute laws of the forum. Ib.

5. **Same.** Although Iowa was originally a part of the Louisiana Purchase and was, therefore, under the French Law, yet, as the common law was, prior to her admission as a State, put into force there by the Territorial Laws of Missouri and by Acts of Congress, of which the court must take judicial notice, therefore, the common law must be presumed to be in force there, upon the question involved, until the contrary is shown. Ib.

6. **Conflict: Opinion of Witness.** Where credible witnesses, having opportunity for observation, testify that a fact exists, no conflict arises from the expression of an opinion to the con-

Digitized by Google

EVIDENCE—Continued.

trary by another witness when it affirmatively appears that his situation was not such as that he could have observed and formed an opinion concerning the fact about which he attempts to express an opinion. Osborn v. Railroad, 245.

7. **Same.** A witness who has sufficient knowledge of the facts and is so situated as to be able to form an opinion, may give that opinion as to the distance an object could be seen, but such evidence is of a weak character as compared to positive testimony on the subject; and where the witness is shown not to have been present at the time and place in question so as to have been able to form an opinion on the matter, it will not have sufficient probative force to create a conflict with such other positive testimony. While a witness may testify that certain things could or could not have been seen from one point to another, it must be shown that he was in a position to form an opinion and did form it, and that his statement is something more than a mere guess. Ib.

8. **Foreign Statute.** Secs. 6281-2, R. S. 1909, provide how a foreign statute may be proved. Oral proof may be offered to show the unwritten law or custom of a foreign State, but not a statute. Trimble Bros. v. Stamper, 300.

9. **Non-prejudicial Error.** Where the entire record shows that the case was tried on both sides upon the theory that the place of the accident was on a publicly travelled street of the city and no contention was made that it was not, the case will not be reversed because there is no evidence specifically and expressly saying it was a street of the city. Best v. St. Joseph, 330.

10. **Hearsay.** Where one testifies, over the objection of the defendant, concerning a conversation that took place with a prosecuting witness, out of the hearing of the defendant, it is error, because it is not part of the *res gestae*, but was *res inter alios*. State v. Johnson, 344.

11. **Oral Declarations: Construction.** In an action not to invalidate, but to construe a will, the oral declarations of the testator relating to the meaning of the instruments are not admissible. Snyder v. Toler, 376.

12. **Primary Evidence: Carbon Copy.** A carbon copy of a document made by the same imprint as the typewritten original is regarded as an original and may be introduced in evidence although the typewritten original is not accounted for. Hay v. Fire Clay Co., 567.

13. **Unsigned Written Instrument: Admissibility.** A document setting out the terms of a contract, but not signed, is not admissible in evidence as a written contract. Ib.

14. **Memorandum: Admissibility.** A written memorandum relating to a transaction, made by one party without the knowledge of the other, is not admissible in evidence, unless it was made contemporaneously with the transaction, and even then it can be used only for the purpose of refreshing the memory of the witness making it and as auxiliary to his testimony. Ib.

15. **Admissions: Corporations.** In an action against a corporation for breach of a contract of employment, a written memorandum

Digitized by Google

EVIDENCE—Continued.

setting forth the terms of the agreement, made by the secretary of the corporation at the request of the president and approved by him, was admissible in evidence as an admission by the corporation, although the president testified that he had never seen or approved it; such denial going to the weight of the evidence and not to its admissibility. Hay v. Fire Clay Co., 567.

16. **Time of Admission.** An admission by the adverse party is competent evidence notwithstanding it was not made contemporaneously with the agreement constituting the subject-matter of the suit. Ib.

17. **Negative Evidence.** Negative facts may be shown by negative evidence. Kelly v. Knights of Father Matthew, 608.

18. **Statements of Counsel: Probative Force.** In an action against a corporation, prosecuted on the theory that it had assumed the obligations of another corporation, which was primarily liable for the cause of action counted upon, and was, therefore, liable to plaintiff, defendant's secretary testified that defendant had taken over the assets and assumed the liabilities of the other corporation, and defendant's counsel then stated that he was "inclined to think there was no such assumption of liability." *Held*, that the statement of counsel was no evidence, one way or the other. Zachra v. Mfg. Co., 683.

19. **Hearsay.** The rule excluding hearsay evidence is mainly based on the fact that there is no opportunity for cross-examining the declarant. Minea v. Cooperage Co., 705.

20. **Evidence Given in Another Case.** In an action by an infant employee's father for loss of the infant's services from personal injuries sustained while employed by defendant corporation, the evidence of an officer of defendant, given at the trial of an action by the infant, by his father as next friend, against defendant for such injuries, was admissible, if properly proved; the question of liability in both cases turning on the same facts and questions of law and the parties being substantially the same. Ib.

21. **Evidence Preserved in Bill of Exceptions.** Where one offers to prove testimony given in another case by means of a bill of exceptions, he must read all of it. Ib.

EXECUTORS AND ADMINISTRATORS.

1. **Concealment of Assets: Verdict: Compromise.** In a trial of interrogatories propounded to an administrator charging him with having embezzeled or concealed property belonging to the estate, where his answer claims the property as a gift from the deceased, the verdict should be for or against him and an attempted compromise by the jury by giving him one half the property when the evidence showed he owned all of it, or none, cannot be sustained. Gray v. Doubikin, 240.

2. **Same: Judgment: Inventory: Appraisement.** On trial of interrogatories charging an administrator with concealing or embezzling property of the estate, where his answer makes claim to the property as a gift from the deceased, if the finding is against him, there is no authority for a judgment that the

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued.

property belongs to the complainant. The judgment should be that it is property of the estate and it should direct the administrator to inventory it and have it appraised. Gray v. Doubikin, 240.

3. **Allowance to Widow in Lieu of Provisions: Ex Parte Proceedings.** An award to a widow of money in lieu of a year's provisions, under Secs. 114 and 115, R. S. 1909, may be made *ex parte*, and, in case the widow is administering the estate, without the appointment of an administrator *ad litem* and without notice to creditors or others interested in the estate, since the year's provisions, as well as an award in lieu thereof, is the widow's absolute property, and in no sense a demand against the estate. Fritch, Admr., v. Fritch, 434.

4. **Same: Amendment of Order of Allowance After Term.** The action of the probate court in allowing a widow a sum of money in lieu of a year's provisions, as authorized by Sec. 115, R. S. 1909, is a final judgment, and hence such allowance cannot be modified by the probate court at a subsequent term. Ib.

5. **Same: Vacation of Order: Statute.** Sec. 220, R. S. 1909, authorizing probate courts to vacate an order allowing a demand against an estate within four months after the allowance thereof, is inapplicable to the allowance of a sum of money in lieu of a year's provisions, as provided for in Sec. 115, R. S. 1909. Ib.

EXEMPTIONS. See **Garnishment, 1, 2.**

FOREIGN JUDGMENTS.

Full Faith and Credit. The judgment of a foreign court of limited statutory jurisdiction is not entitled to full faith and credit unless the jurisdiction of the court over the subject-matter and of the person is shown. Trimble Bros. v. Stamper, 300.

FOREIGN LAWS. See **Evidence, 1, 2, 3, 4, 5, 8; Garnishment, 1, 2.**

FRATERNAL BENEFICIARY ASSOCIATIONS.

1. **Action for Death Benefit: Prima-Facie Case.** In an action on a death benefit certificate issued by a fraternal beneficiary association, the certificate, coupled with proof of death of insured, make out a prima-facie case, casting on defendant the burden of establishing its defense. Bange v. Supreme Council, 21.

2. **Non-payment of Assessment: Notice.** Where a by-law of a fraternal beneficiary association required notice of assessments levied to be mailed to the members at their regular addresses, the mailing of such notice was a condition precedent to the right of the association to declare a forfeiture of a benefit certificate because of non-payment of an assessment. Ib.

3. **Same: By-Laws Construed.** The by-laws of a fraternal beneficiary association required members to pay assessments within thirty days after notice thereof was mailed to their regular addresses, and provided that a failure to do so before the first meeting of the local lodge after the expiration of the thirty days operated to suspend the member, but that the local

Digitized by Google

lodge, by a majority vote, might make the payment for the delinquent. The local lodge had established the custom of deferring action on the question as to whether it would pay a delinquent's assessment until the next meeting after the assessment was levied. *Held*, that the by-laws were not self-executing, and that a member would not be suspended for non-payment of an assessment, even though notice thereof was duly mailed to his regular address, until the local lodge had refused to pay the assessment and had declared him suspended. Ib.

4. **Notice of Assessments.** The parties to an insurance contract may agree that the mailing of a notice to the regular address of the insured constitutes notice to him; and hence where a fraternal beneficiary association and a member made such an agreement, a notice of an assessment levied, mailed to the member's regular address, was notice to him, whether he received it or not. Ib.

5. **Non-payment of Assessment: Sufficiency of Notice.** In an action on a death benefit certificate issued by a fraternal beneficiary association, defended on the theory that insured had forfeited his certificate by reason of his failure to pay an assessment, *held* that whether notice of the assessment was mailed to insured's regular address, as required by the certificate and by-laws, was a question for the jury, under the evidence. Ib.

6. **Same: Notice.** Where the by-laws of a fraternal beneficiary association required notice of an assessment and of a suspension for non-payment thereof to be mailed to the regular address of the member affected, and provided that a member who was suspended for non-payment of an assessment could get reinstated by payment of the assessment within thirty days, proof of the member's actual receipt of the notice, in time for him to have exercised his right toward securing a reinstatement within the thirty day period, is necessary to sustain his suspension, if the notices were not mailed to his regular address. Ib.

7. **Same.** Under a by-law of a fraternal beneficiary association, requiring notice to be given a member of his suspension for non-payment of an assessment, it is necessary, to sustain the suspension, that he be given notice thereof by the association, and the fact that he obtained knowledge thereof in some other way will not suffice. Ib.

8. **Same: "Regular Address."** In an action on a death benefit certificate issued by a fraternal beneficiary association, where the question as to whether notice of an assessment had been sent to the "regular address" of insured, as required by the by-laws of the association, was in issue, an instruction which made the regular address of insured depend upon his intention of making that place his place of residence was erroneous, since the expression "regular address" merely referred to the place where insured would be most likely to get his mail. Ib.

9. **Same: Acquiescence in Illegal Suspension.** Even though the suspension of a member of a fraternal beneficiary association is void, he is nevertheless under a duty to his fellow-members to affirm or disaffirm the suspension in a distinct manner and within a reasonable time; and hence where a member, who is illegally suspended, although having knowledge of the sus-

Digitized by Google

pension, takes no step to secure his reinstatement, allows assessments, which had accrued and were payable prior to his suspension, to remain unpaid, and does not tender such assessments to the association, nor any subsequently accruing, he will be treated as having acquiesced in his illegal suspension and having abandoned his insurance. Bange v. Supreme Council, 21.

10. **Same: Notice.** In order that the acquiescence of a member of a fraternal beneficiary association in his illegal suspension from membership be binding, it is not necessary that he be given notice of the suspension by the association, as required by its by-laws, but it is sufficient if he acquires knowledge of the suspension in some other way. Ib.

11. **Action on Certificate: Defenses: Burden of Proof.** In an action on a certificate issued by a fraternal beneficiary association, the introduction of the certificate and proof of the death of the member made a prima-facie case, and the burden was then on defendant to establish its defense that the member resigned from the association prior to his death, since the status of a member, as such, is presumed to continue until the contrary is made to appear. Keily v. Knights of Father Matthew, 608.

12. **Same: Question for Jury.** In an action on a certificate issued by a fraternal beneficiary association, *held* that it was a question for the jury, under the evidence, whether insured had resigned from the association, as alleged by defendant in defense of the action, and hence it was error to direct a verdict for defendant. Ib.

13. **Voluntary Associations: Right of Member to Resign.** Unless the compact between the members of a voluntary association otherwise provides, a member may withdraw from it at any time without the consent of the association, subject only to the right of the association to enforce against him any obligation incurred by him during his membership; and hence where a member of a fraternal beneficiary association resigned in open meeting of a subordinate lodge of the association, it was not essential that the association act upon the resignation, in order to terminate the relations between it and the member. Ib.

14. **Resignation of Member: Evidence.** On the question of whether a member of a fraternal beneficiary association resigned therefrom in open meeting of a subordinate lodge of the association, the testimony of a witness present at such meeting, that he heard no such announcement by the member, possessed probative force and was to be received and considered with the other facts and circumstances, since a negative fact may be shown by negative evidence. Ib.

15. **Same.** On the question of whether a member of a fraternal beneficiary association resigned therefrom in open meeting of a subordinate lodge of the association, the testimony of a witness, that, after the member had expressed his dissatisfaction at a raise in the rate of assessments, he walked to the secretary's desk, and, waving his passbook in the air, said, "I am done," did not conclusively establish that he had resigned, so as to justify the court's declaring such to be the fact as a matter of law, since the member may not have intended such expression as a resignation. Ib.

Digitized by Google

FRAUD AND DECEIT. See Principal and Agent, 10, 11; Statute of Limitations, 1, 2.

FREE SPEECH. See Injunctions, 17.

"FRONTAGE." See Special Taxbills.

FULL FAITH AND CREDIT. See Foreign Judgments.

"FURRING." See Building Contracts, 1.

GARNISHMENT.

1. **Exemptions: Illinois Law: Conflict of Laws: Comity.** An employer who is garnished in this State, in an action against an employee living in Illinois and not personally served nor appearing in the action, may, under the doctrine of comity, set up as a defense the exemption provided for by Sec. 14, p. 1252, "Hurds' Revised Statutes of Illinois, 1912," which provides that the wages of a wage-earner who is the head of a family, to the amount of $15.00 a week, shall be exempt from garnishment, and which requires every employer to pay such exempt wages to the employee when due, upon his making and delivering an affidavit that he is the head of a family notwithstanding any garnishment proceedings. Wine & Liquor Co. v. Coal & Mining Co., 93.

2. **Same: Right of Garnishee to Set up Exemptions.** Sec. 14, p. 1252, Hurds' R. S. of Illinois, 1912, provides that the wages of a wage-earner who is the head of a family, to the amount of $15 a week, shall be exempt from garnishment, and requires every employer to pay such exempt wages to the employee when due, upon his making and delivering an affidavit that he is the head of a family, etc., notwithstanding any garnishment proceedings. *Held*, that an employer who is garnished in this State, in an action against an employee living in Illinois and not personally served nor appearing in the action, may set up as a defense the exemption provided for by that statute, where the employee makes and delivers the required affidavit to him. Ib.

3. **Confusion of Names: Liability of Garnishee.** Where a garnishee, under an execution against B. C. Braxton, admitted that it was indebted to C. M. Braxton and that he represented himself to plaintiff as B. C. Braxton when the account sued on was contracted, judgment should be rendered for plaintiff. Yawitz v. R. R., 718.

HABEAS CORPUS.

1. **Scope of Inquiry.** Although a *habeas corpus* proceeding is a collateral attack on the judgment under which a person is restrained of his liberty, it is nevertheless competent to inquire, in a hearing on the writ, not only concerning the jurisdiction of the court over the subject-matter and the person of the person committed, but to also inquire into the facts concerning the particular exercise of jurisdiction by virtue of which such person was committed. In re Heffron et al., 639.

2. **Same: Commitment only Considered.** In a *habeas corpus* proceeding, the question of whether the trial court had jurisdiction to imprison the petitioner for contempt in violating an injunctive order must be determined from the commitment

Digitized by Google

HABEAS CORPUS—Continued.

itself, which is required, by Secs. 2472 and 3884, R. S. 1909, to set forth, and is conclusively presumed to set forth, the facts on which it rests. In re Heffron et al., 639.

3. **Proceedings Reviewable: Commitment for Contempt.** One imprisoned for contempt for violating an order which the court had no authority to make may be released on *habeas corpus*. Ib.

HIGHWAYS. See **Injunctions, 14, 15, 16, 18; Roads.**

Right to Congregate upon Sidewalks. Persons have a right to congregate upon and use the sidewalks in a public street, in the absence of a nuisance appearing, as by continual trespass, provided they do no injury to, nor congregate with a view of injuring, the property or business of another. In re Heffron, 639.

HUSBAND AND WIFE.

1. **Damages: Loss of Consortium: Evidence.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant, evidence by the husband as to the pain suffered by the wife was admissible, since it would be difficult to establish his damages without evidence of the pain suffered by the wife, as a result of which he was deprived of his marital rights. Reeves v. Lutz, 61.

2. **Right of Action by Husband: Loss of Consortium.** The husband's right of consortium at common law includes the right to the services of the wife to be rendered him, together with the right to her society and the comfort incident to her companionship, for the wrongful deprivation of which he may recover, although the wife was not accustomed to do any physical labor for him, and although the pecuniary value of such services cannot be accurately ascertained. Ib.

3. **Loss of Consortium; Evidence.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant, evidence that the wife was disabled from performing the duties of a housewife and that the husband was obliged to employ another woman to keep house for him warranted the submission of the value of such services to the jury, although there was no direct proof of such value. Ib.

4. **Same: Excessiveness of Verdict.** In an action by a husband for the loss of his wife's services and society as a result of injuries inflicted upon her through the alleged negligence of defendant surgeon in treating a wound left by a surgical operation performed by defendant *held* that a verdict for $1500 was not excessive. [Reynolds, P. J., *dubitante*.] Ib.

INDICTMENTS AND INFORMATIONS. See **Larceny, 1.**

INJUNCTIONS.

1. **Pleading: Sufficiency of Petition to Support Judgment.** A petition brought by different parties having a common interest in having a publication prevented by injunction, and stating

Digitized by Google

INJUNCTIONS—Continued.

facts showing that property rights of one of the parties and personal rights of the others and of all of them will be infringed upon, and the public will be defrauded if the publication be not stopped, sufficiently states a cause of action to support a judgment in the absence of a specific and timely attack made thereon. All of the plaintiffs had a common right to have the publication stopped. By one and the same wrongful act the same injury comes to all. Masonic Temple Co. v. Young, 278.

2. **Same: Improper Joinder of Parties: Multifariousness: Waiver.** Even if a petition is multifarious and contains parties improperly joined, yet, if defendant answers and goes to trial the defects of the petition are waived. Ib.

3. **Trade Names and Unfair Competition.** Trade names differ from trade-marks in that no exclusive proprietary interest in the former is required to maintain injunction against infringement, while it is necessary in the case of a trade-mark. Trade names are divided into exclusive and non-exclusive trade names. The former are protected upon the same principles that trade-marks are. Nonexclusive trade names are such as are *publici juris*, open to or exercisable by all persons in their primary sense, but which in a secondary sense have come to indicate the business of a particular trader. Furniture Hospital v. Dorfman, 302.

4. **Same: Nonexclusive Trade Name in Its Secondary Meaning.** Words which, in their primary meaning are not capable of exclusive appropriation as a trade-mark, may, nevertheless, by long use in connection with the business of a particular trader come to be understood by the public as designating the business of that particular trader. And if plaintiff can prove that the name he has chosen has been so exclusively identified with his business as to indicate his business alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof he is not entitled to relief. Ib.

5. **Same.** Unfair competition consists in passing off, or attempting to pass off, the goods or business of one person as and for the goods or business of another. Ib.

6. **Same: Evidence.** No inflexible rule can be laid down as to what will consitute unfair competition by the unlawful use of a nonexclusive trade name in its secondary meaning. It is always a question of fact. The question in every case is whether or not, as a matter of fact, the name adopted by defendant has previously come to indicate the plaintiff's business and whether the public is likely to be deceived. Ib.

7. **Same: Mere Descriptive Terms.** Names which are mere descriptive terms of the business and generic in their nature are not capable of being appropriated. If the name sought to be protected is one which may be used by everyone in an honestly descriptive and nondeceptive manner the court may declare, as matter of law, that there can be no unfair competition in the use of such terms. Ib.

8. **Same.** But even descriptive terms may by long use become identified in the minds of the public with a particular trader's

Digitized by Google

INJUNCTIONS—Continued.

business, and in such cases it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other. If the name be an odd, unusual, fanciful or striking name, it may be appropriated by a trader even though it be descriptive of the business he carries on. If, for its description, it depends upon a figure of speech or an association of ideas, and is not merely a literal description of the business, it is a name that is subject to appropriation within the limits of the territory that the business serves. An unusual, novel name, likely to catch the public fancy and stick in the memory is of great value in advertising a business and is protected. Even though it be descriptive of the business, it is not necessary for the subsequent trader to use such terms in such a manner as to give his business the same catchy and attractive name, for it is easy to use descriptive terms in some other honestly descriptive way. Masonic Temple Co. v. Young, 278.

9. **Same: Demurrer to Evidence.** The question of unfair competition being one of fact, a demurrer should not be sustained, where the petition is otherwise sufficient, unless the court can say, as matter of law, that the name sought to be protected is merely descriptive of the business and is so entirely devoid of novelty, originality and striking characteristics as not to be capable of being appropriated as a trade name. Ib.

10. **Same: Name "Furniture Hospital."** The court cannot say, as mater of law, that the name "Furniture Hospital" is so purely descriptive and so usual and common as to be incapable of appropriation as a nonexclusive trade name with a secondary meaning. Ib.

11. **Same: Addition of Other Words.** The mere addition of geographic names such as "New York," "Africa," "Asia," etc., cannot be declared as a matter of law to constitute such a difference in the names as to make the name so altered free from complaint. Similarity as well as precise identity deceives, and a nice discrimination in names cannot be expected from a busy public. And it is by the adoption of some such addition rendering the name similar, but not identical, that unfair competition is usually attempted to be perpetrated. Ib.

12. **Right to Enjoin Interference with Business Conspiracy.** A number of persons who have conspired or confederated together in combination may be restrained from interfering with the business of another so as to entail a substantial injury upon him, as by persuading his patrons, against their will, or by violence or threats, from having beneficial business intercourse with him. In re Heffron, 639.

13. **Violation: Civil or Criminal Contempt: Requisites of Commitment.** A contempt for violating an injunction restraining the contemnor from interfering with plaintiff's business, although falling within the category of civil contempts, for the purpose of classification, is regarded in the law as criminal in its nature, when considered under the requirements of the statutes concerning the judgment and process of commitment by which the contemnor is restrained of his liberty; and hence, in such a case, the finding, judgment and commitment are to be strictly construed in favor of the contemnor, and all of the facts essential to show that the court had jurisdiction of the subject-matter and of the person and had jurisdic-

Digitized by Google

INJUNCTIONS—Continued.

tion to make the order in the particular case must appear in the judgment and the commitment. Ib.

14. **Interference with Business: Congregating on Sidewalk.** An injunction restraining striking employees from, singly or in numbers, stationing themselves or congregating upon the sidewalk adjoining and in front of the employer's place of business for the purpose of distributing cards or circulars, or of addressing remarks concerning the employer or its business, to persons passing along the sidewalk, was beyond the power of the court, since it had no right to restrain the parties from so using the sidewalk, unless they did so with a view of interfering with the employer's business, its employees or patrons, through threats, violence, intimidation, or by persuading persons desiring to patronize the employer to desist therefrom against their will, or unless the free ingress to or egress from the employer's premises were thereby impeded. Ib.

15. **Highways: Interference with Use of Sidewalk: Right of Abutting Owner to Enjoin.** While an obstruction or interference with the free use of sidewalks is a public nuisance, an abutting proprietor cannot restrain such nuisance, unless he suffers damages peculiar to him, different in kind, and not merely in degree, from those sustained by other members of the public. Ib.

16. **Same.** The proprietor or occupant of a building abutting on a street may enjoin others from so using the sidewalk as to prevent free ingress and egress to and from the building, since, although the obstruction of the street constitutes a public nuisance, it also involves a private nuisance inflicting a peculiar injury on him, different in kind, and not merely in degree, from that sustained by the members of the community at large. Ib.

17. **Right to Enjoin Distribution of Circulars: Constitutional Law: Freedom of Speech.** It is not within the power of a court of equity to restrain one from distributing cards or circulars concerning the business of another, or of addressing remarks concerning his business to persons passing along the sidewalk, if nothing more appears, since the constitutional provision assuring the right of free speech implies that the right is to be enjoyed by every citizen, subject only to his liability in damages for its abuse. Ib.

18. **Interference with Business: "Patrolling."** An injunction restraining striking employees, either singly or in numbers, from patrolling the sidewalk adjoining the employer's place of business was too vague and indefinite to be enforcible, since, while "patrolling" involves the idea of walking to and fro as a guard, it in and of itself implies nothing unlawful. Ib.

19. **Same: Force: Intimidation, etc.** Striking employees were properly enjoined from preventing, or attempting to prevent, by force, violence, threats, menace or intimidation, persons from patronizing the employer's place of business and from compelling, or attempting to compel, by threats, intimidation, force or violence, other employees to refuse to perform their duties. Ib.

Digitized by Google

INJUNCTIONS—Continued.

20. **Violation: Contempt: Sufficiency of Commitment.** Where an injunction restrained striking employees from assaulting or exercising violence on any person patronizing the employer's place of business, or any of its employees, a judgment and commitment for contempt, stating that one of the defendants had committed an assault upon a person named within a short time after he had left the employer's place of business, and that the assault was unprovoked and in violation of the injunction, without any finding that such person was a patron or employee of the employer, was insufficient to warrant the imprisonment of such defendant, under the rule that the commitment must bring the defendant strictly within the terms of the injunction and show that he violated it; the statement that it was a violation being a conclusion. In re Heffron, 639.

INSANE PERSONS.

1. **Setting Aside Judgment for Insanity.** In a petition for a writ of error *coram nobis* to set aside a judgment rendered against him for assault and battery on a trial when he was insane, if it was alleged that he was insane at the time of the trial and judgment, it is not necessary to also allege that he was insane when he committed the assault. Gibson v. Pollock, 188.

2. **Torts: Civil Liability: Defense.** An insane person is civilly liable for his torts, such as assault and battery, but if an action is brought against him he must have the right and benefit of a defence by a sane person (either himself recovered or a guardian) to ascertain if he committed the tort. Ib.

3. **Same: Pleading: Demurrer.** Where a petition for writ of error *coram nobis* alleges in general terms that the insane person "had a good and complete defense to said action" for assault and battery charged against him, it is sufficient after judgment, even though it be conceded to be bad if attacked by special demurrer for not alleging the facts constituting the defence. Ib.

4. **Same: Guardian: Pleading.** Where a petition for a writ of error *coram nobis*, is in the name of a guardian for an insane person, an objection to it on that ground is waived unless it be made a ground of special demurrer. Ib.

5. **Same: Trial: Evidence: Defence.** On trial of a writ of error *coram nobis* to set aside a judgment on the ground that it was rendered against an insane person for an alleged assault and battery, it is not necessary to prove facts showing that such person had a good defence to the action for assault and battery. Ib.

6. **Same: Evidence.** Evidence showing a person carried on imaginary conversations with the dead and with the angels; that he preached sermons to imaginary congregations through the night, is sufficient upon which to base a finding of insanity. Ib.

7. **Same: Limitations: Laches.** The Statute of Limitations does not run against a writ of error *coram nobis;* and though a judgment against an insane person, attacked by such writ, has been rendered more than five years, yet if only a period of eighteen months has passed since the appointment of a guardian before he brings his action, there is no laches. Ib.

Digitized by Google

INSTRUCTIONS. See Appellate Practice, 29; Carriers of Passengers, 19; Damages, 4, 11, 12; Fraternal Beneficiary Associations, 9; Master and Servant, 7, 10, 11, 14, 20; Municipal Corporations, 3; Physicians and Surgeons, 5, 6; Principal and Agent, 6, 7.

1. Penal Statute. Where an instruction includes Sec. 5425, R. S. 1909, which relates to the penal feature of the statute, it is erroneous as applied to a private conveyance. Roberts v. Trunk, 358.

2. Interest. When an instruction asks for interest from the date of demand, and judgment is so given, it is erroneous, where the plaintiff has failed to ask for interest in his petition. Davis v. Creamer, 374.

3. Broadening Issues. The instructions must not broaden the issues made by the pleadings. Smith v. Ice & Fuel Co., 456.

4. Not Supported by Evidence. It is error to submit, as a predicate of liability, a matter which is not supported by any evidence, or which in no way gave rise to, or contributed to produce, the injury or loss for which a recovery is sought. Ib.

5. Referring to Pleadings. An instruction, in an action for personal injuries, requiring the jury to find that plaintiff's fingers were injured "as set out in the petition," in order to return a verdict for him, was erroneous, since the instructions must be predicated on the proof and not on the pleadings. Ib.

6. Refusal: Covered by Other Instructions. It is not error to refuse an instruction where the matter it covers is fully covered by another instruction given. Lazerine v. Lazerine, 476.

7. Construction: Entire Charge Considered. In determining whether an instruction is erroneous, it must be construed in connection with the other instructions given, and an ambiguous or general term in one instruction may be explained by another instruction, and a partial view may also be thus supplemented, provided the whole be consistent and harmonious. Pendegrass v. R. R., 517.

INSURANCE. See Accident Insurance: Employers' Liability Insurance; Liability Insurance; Fraternal Beneficiary Associations; Life Insurance.

1. Rules for Construing Policies. Language employed in an insurance policy is to be construed so as to effectuate the insurance and not so as to defeat it, and where the language is doubtful in the least, it is to be strictly construed against insurer and in such a way as to protect the interests of insured, so that, where words are susceptible of the interpretation given them by insured to afford indemnity, they will be so construed, although insurer, in fact, intended otherwise; but this rule does not authorize the courts to distort certain and definite covenants, expressed in plain English, so as to make them include a risk which is clearly excluded by the insurance contract. Mitchell v. Accident Co., 1.

2. Construction of Policy. The terms and conditions of an insurance policy, if ambiguous or of doubtful meaning, are to be construed most strongly against insurer. Realty Co. v. Insurance Co., 123.

Digitized by Google

INTEREST. See Liability Insurance, 1.

Pleading. When an instruction asks for interest from the date of demand, and judgment is so given, it is erroneous, where the plaintiff has failed to ask for interest in his petition. Davis v. Creamer, 374.

INTOXICATING LIQUORS. See Local Option.

JUDICIAL NOTICE. See Evidence, 1, 5.

JUDGMENTS. See Foreign Judgments; Habeas Corpus, 1, 2; Injunctions, 13, 20; Justices' Courts, 2; Res Adjudicata, 1; Writ of Error Coram Nobis.

Nunc Pro Tunc Judgment. A judgment was rendered against three receivers of a railway company as such receivers, but by mistake the clerk entered the judgment against them as individuals. It was held that after appeal had been taken and the transcript filed in the appellate court, the trial court had jurisdiction to correct the judgment *nunc pro tunc* so as to enter it as rendered. Smith v. Delano, 242.

JUDICIAL SALES.

1. **Void Execution: Purchase: Sale Set Aside.** An execution was issued on a judgment wherein the plaintiff at the time of its issuance and levy was dead. The writ was levied upon real estate of the defendant which was sold by the sheriff and bought in by the plaintiff. Before the credit of the bid was made on the judgment and before any deed was made by the sheriff, on plaintiff's motion the execution sale was set aside and the writ quashed by the court on the ground that the writ was void. Afterwards plaintiff brought an action on the judgment and defendant set up the sale and purchase by plaintiff and claimed a credit, as a payment on the judgment, of the amount of plaintiff's bid. *Held*, that the rule of *caveat emptor* did not apply and that the sale was properly set aside and the credit of the bid properly disallowed. Chilton v. Harris, 267.

2. **Void Sales.** The rule of *caveat emptor* at all judicial sales is in force in Missouri; but it does not apply to sales which are void. Ib.

3. **Quitclaim Deed: Void Deed: Liability of Vendor.** A purchaser at a judicial sale must beware and has no protecting warranty, his purchase being like a purchase by quitclaim deed from an individual. But this does not apply to a void sale, and though one purchasing by quitclaim deed is not entitled to reimbursement if there be no title conveyed, yet he is entitled to a *valid* deed and if it be void he may have redress on *that* account. Ib.

4. **Same: Mistake of Law: Independent Action.** There may be relief on account of the payment of money under mistake of fact, but not in an independent action for mistake of law, if there is no fraud. Ib.

5. **Same.** While one may not have a right of action for mistake of law, in an independent suit, yet if, under a void execution sale, he makes a purchase, he may go into court in that action and have relief. Ib.

Digitized by Google

JURISDICTION. See **Constitutional Questions; Courts of Appeals; Habeas Corpus, 1, 2; Injunctions, 13, 20.**

JURY.

Right of Trial by Jury: Compulsory Reference. In cases of compulsory reference, under Sec. 1996, R. S. 1909, the right of trial by jury does not obtain as in other actions at law, since the right and power to make the reference inhered in the court by statute antedating our present constitutional provision, preserving the right of trial by jury inviolate to parties litigant as it had theretofore existed. Valleroy v. Enright, 553.

JUSTICES' COURTS.

1. **Appeal by Plaintiff: Right of Plaintiff to Dismiss Suit.** A plaintiff appealing to the circuit court from a judgment rendered for defendant by a justice of the peace has the right to dismiss his cause of action, under Sec. 1980, R. S. 1909, pending a motion filed by defendant to dismiss the appeal. Leonard v. Building Co., 480.

2. **Appeal: Suspension of Judgment.** An appeal from a judgment of a justice of the peace does not vacate the judgment altogether, but merely suspends it, pending the appeal. Ib.

3. **Same: Effect of Dismissal of Suit.** Where a plaintiff appeals to the circuit court from an adverse judgment of a justice of the peace, and then exercises his right to dismiss the suit, the case is taken out of court and the judgment of the justice is thereby vacated. Ib.

4. **Pleading: Defenses.** In an action on a contract made for defendant by its agent, begun in a justice's court, where no formal pleadings are required, defendant could defend on the ground of illegality of the contract, as being collusive between its agent and plaintiff, without pleading such illegality, even in the circuit court, on appeal. Meyer v. Promotion Co., 695.

LABOR UNIONS. See **Conspiracy, 1; New Trial, 5, 8.**

LARCENY.

1. **Sufficiency of Information.** An information charging defendant with petit larceny *held* sufficient. State v. Powell, 7.

2. **Sufficiency of Evidence.** Evidence in a prosecution for petit larceny, *held* sufficient to sustain a conviction. Ib.

LAWS. See **Foreign Laws; Statute.**

LIABILITY INSURANCE.

Policy Construed: Maximum Liability: Interest and Costs. A policy of insurance indemnified insured against loss arising from legal liability for damages on account of bodily injury suffered by any person as a result of an accident happening on the premises of insured, but provided that insurer's liability should in no case exceed $5000. Subsequent clauses of the policy provided that, in case legal proceedings were taken on a claim against insured, the insurer should, at its own cost, undertake the defense of such proceedings, and should have entire control of such defense, but if it should offer to pay

Digitized by Google

LIABILITY INSURANCE—Continued.

insured the full amount for which it is liable, it should not be bound to defend, nor be liable for any costs or expenses which insured might incur in defending, and that insured should not, except at his own cost, settle any claim nor incur any expenses without the consent of insurer. A judgment against insured in the amount of $5000, for injuries covered by the policy, was affirmed by the appellate court, and insured paid the amount, plus interest and costs. Insurer conducted the defense of the case and caused the appeal to be taken. *Held*, that, under the terms of the policy, insured's right of action did not depend upon a judgment being first rendered against it in the personal injury action, but that its right to indemnity accrued when the accident occurred, and insurer having conducted the defense and caused the appeal to be taken, was liable for court costs and interest on the judgment, under the provision that it should, "at its own cost, undertake the defense," notwithstanding these items, added to the amount of the judgment, exceeded the amount of the stipulated maximum liability; interest being the compensation paid by a debtor for the detention of the debt, and insurer having delayed the payment, interest must be considered as part of the costs and expenses of the litigation. Realty Co. v. Insurance Co., 123.

LIFE INSURANCE. See **Fraternal Beneficiary Associations.**

1. **Misstatement of Age in Application.** Where a life insurance company issues a policy to one who inadvertently made a wrongful statement in the application as to his age, the application being afterwards corrected and the additional premium paid, and the assets and liabilities transferred to another company, the latter company is bound by the acts of its predecessor and the rights of plaintiff cannot be restricted to the amount of insurance the premium paid would have purchased at the correct age of the assured. Lowenstein v. Ins. Co., 364.

2. **Policy Contract: Beneficiary's Rights Under.** While a life insurance policy, where there is no special provision to the contrary, confers a vested right upon the beneficiary which cannot be impaired without the beneficiary's consent by any act of the assured in surrendering, assigning or pledging same, yet a valid right of the insured to surrender the policy for cash without the consent of the beneficiary may be made a part of the policy contract. Cornell v. Ins. Co., 420.

3. **Wife's Right as Beneficiary: Statutory Provisions.** Sec. 6944, R. S. 1909, gives no additional rights to a wife as beneficiary under a life insurance policy, but merely protects her under and subject to the provisions of such policy. Ib.

4. **Assigning or Pledging Policy: Foreclosure and Enforcement.** Where the insured assigned or pledged a life insurance policy in conformity with a provision therefor in the policy, no subsequent ratification or authorization was necessary to enable the assignee or pledgee to foreclose the pledge and enforce the assignment in payment of the secured debt. Ib.

5. **Same: Contingent Interests.** Though the insured's right to surrender a 20 year life insurance policy for cash is contingent before the expiration of the 20 year period, yet an assignment thereof before such time is valid. Ib.

Digitized by Google

LIFE INSURANCE—Continued.

6. **Same: Formality.** Where a life insurance policy was pledged pursuant to a provision therein contained, a written assignment was not necessary, but the mere deposit of the policy as collateral security and its retention by the pledgee with the consent of the pledgor for an existing debt, was sufficient to give the pledgee all the rights of an assignee for the same purpose. Ib.

7. **Same: Evidence.** Action on a life insurance policy, which the company claimed had been pledged and assigned to another as collateral security and cashed by the pledgee. Evidence examined and *held* not sufficient to sustain a finding that the insured did not make a written assignment of the policy. Ib.

LIMITATIONS. See **Statute of Limitations.**

LOCAL OPTION.

Crimes and Prosecution: Sufficiency of Evidence. The defendant was convicted for a violation of the Local Option Law and from that conviction prosecutes this appeal. He was the proprietor of a restaurant and had procured a license from the Federal authorities to sell intoxicating liquors and was convisted of having sold three pints of whiskey. *Held*, that the demurrer to the evidence was properly overruled. State v. Johnson, 344.

MANDAMUS.

Discretionary Writ. Issuance of mandamus to compel the county court to docket and try a road case appealed from a township board is discretionary with the circuit court, and if the record of the county court shows that for any cause, the relator is not entitled to the writ, it will be refused. State ex rel. v. Urton et al., 264.

MASTER AND SERVANT. See **Mines and Mining.**

1. **Breach of Contract of Employment: Rebating.** Under a contract of employment requiring the employee to get the market price for oil sold for the employer and obligating the employer to pay a commission for oil sold, the employer was justified in discharging the employee for giving rebates out of his commission to his customers, as a result of which the oil was sold for less than the market price, where the employer, after having given the employee permission to rebate in this matter, notified him to discontinue the practice, and he refused to do so. Goller v. Oil and Supply Co., 48.

2. **Same.** A contract of employment, which required the employee to get the market price for oil sold for the employer, and which obligated the employer to pay the employee a stipulated amount for oil sold by him, was breached by sales made by the employee at the market price but under an agreement with his customers that he would refund them five per cent of his commission, justifying his discharge. Ib.

3. **Injury to Servant: Dual Capacity Doctrine.** The master's liability for injury to a servant, asserted on the ground of negligence of a servant occupying the dual capacity of fellow

Digitized by Google

MASTER AND SERVANT—Continued.

and superior servant, depends on the character of the act and not on the rank of the servant. Small v. Ice & Fuel Co., 456.

4. **Same: Concurring Negligence.** Where the negligence of the master, whether through the negligent act of a vice principal or otherwise, is combined with the negligent act of a fellow servant in producing an injury to a servant and the negligence of neither alone is the efficient cause thereof, the master is liable. Ib.

5. **Same: Negligence of Foreman: Liability of Master.** A foreman is the *alter ego* of the master, so that if the foreman orders a servant to perform an unusual task, disassociated from the latter's ordinary duties and involving dangers unknown to and unappreciated by him, and the foreman negligently inflicts injury upon him while he is attempting to carry out such order, the master is liable. Ib.

6. **Same: Vice Principal or Fellow Servant: Concurring Negligence.** Plaintiff was ordered by his foreman to assist the latter in letting down a heavy iron gate. While engaged in obeying this order, plaintiff's hand was caught under the gate, as a result of the foreman prematurely lowering his end. *Held*, that the undertaking not being one of ordinary common labor in which the servant and the foreman were engaged as co-laborers upon an equal footing, but a matter pertaining to the foreman's duties, the latter was a vice principal, and the injury must be regarded as having been caused by the negligence of such vice principal in ordering the servant to perform an unusual task, outside the scope of his ordinary duties and involving more or less danger, without warning or instruction as to the latter, combined with his negligence in prematurely lowering his end of the appliance; and if the latter should be regarded as an act of a fellow servant (which is not decided), the master would nevertheless be liable, for, in that event, the injury would have come about through the combined negligence of the master and a fellow servant. Ib.

7. **Same: Instructions: Broadening Issues.** In an action by a servant for injuries sustained by reason of the manner in which an appliance was used, where it was neither alleged nor proved that the appliance was in itself dangerous or unsafe, and the master's duty to furnish a safe place to work was not an issue, an instruction that it was the master's duty to furnish the servant with a reasonably safe place to work and authorizing a verdict on a finding that the appliance was dangerous or unsafe, was erroneous as being without the issues. Ib.

8. **Injury to Servant: Incompetent Fellow Servant: Liability of Master.** In order to cast liability on the master for an injury to a servant, caused by the act of a fellow servant, on the ground that the fellow servant was habitually incompetent or negligent, the general rule is, that it must appear that the negligent servant was habitually incompetent or negligent, and that such fact was known to the master, or by ordinary care could have been known to him, and that after having such actual or constructive knowledge he retained the incompetent or negligent servant in his employ. Sustar v. Construction Co., 495.

9. **Same: Sufficiency of Evidence.** In an action for injuries to a servant working in a sewer trench, as a result of the negligence

Digitized by Google

MASTER AND SERVANT—Continued.

of the signalman in charge of the sewer machine in failing to see that the buckets were hoisted to a sufficient height to clear the crossbeams of the machinery, by which one of them was dumped and the stone it contained precipitated on plaintiff below, evidence *held* to require submission to the jury of the question of the incompetency of the signalman and the master's negligence in keeping him in such a position, when it knew, or by the exercise of ordinary care could have known, that he was incompetent. [REYNOLDS, P. J., dissents.] Ib.

10. **Same: Instructions.** In an action for injuries to a servant working in a sewer trench, as a result of the negligence of the signalman in charge of the sewer machine in failing to see that the buckets were hoisted to a sufficient height to clear the crossbeams of the machinery, by which one of them was dumped and the stone it contained precipitated on plaintiff below, an instruction that if defendant negligently employed and retained an incompetent and unskilled signalman who was not reasonably competent and fit to perform his duties, and because of such incompetency he caused the carriage to be started and moved along the track while one of the buckets was hanging so low that it struck a crossbeam and was caused to tip and spill a rock on plaintiff, and defendant knew, or by ordinary care would have known, of the unfitness and incompetency of the signalman and the danger to plaintiff by reason thereof, the verdict should be for plaintiff, was not objectionable, either on the ground that the jury were not required to find that the signalman actually signaled the engineer to start the carriage when the buckets had not been raised to the proper height, or as assuming that the signalman was incompetent. Ib.

11. **Same: Instructions.** In an action for injuries to a servant working in a sewer trench, as a result of the negligence of the signalman in charge of the sewer machine in failing to see that the buckets were hoisted to a sufficient height to clear the crossbeams of the machinery, by which one of them was dumped and the stone it contained precipitated on plaintiff below, the court instructed that if defendant operated a carriage on a track extending along the top of the sewer, and large buckets were conveyed along the track, by means of cables, over the place where plaintiff was required to stand, and the buckets, "while so customarily operated," were hanging so low that they came in contact with a crossbeam, and one of the buckets was tipped and a rock spilled out, which struck plaintiff, and that defendant had adopted and used at said time a plan which was not reasonably safe, in that the buckets were likely to tilt and swing and strike the crossbeam and to spill their contents, and that defendant knew, or by ordinary care should have known, that the plan was not reasonably safe, and such negligence, if any, directly caused the injury, plaintiff could recover. *Held*, that the words "while so customarily operated" should not be construed to mean that the jury should find that the customary or normal way of handling the carriage and buckets adopted by defendant was to move the carriage when the buckets were so low that they came in contact with crossbeams, but should be construed to mean that jury should find that, on the occasion in question, the buckets were hanging so low that they came in contact with the beams; and hence the instruction was not vulnerable to the objection that it was bad because there was no evidence tending to prove that the apparatus was customarily operated in a negligent manner. Ib.

Digitized by Google

MASTER AND SERVANT—Continued.

12. **Same: Defective Appliances: Unsafe Plan of Operation.** A sewer machine consisting of a carriage carrying buckets was operated upon wheels along an elevated track extending along and above the top of the sewer. This track was supported by a trestle, which stood upon timbers laid across the sewer. The trench was dug by filling large buckets therein, which were hoisted and conveyed by the carriage along the track and dumped. The rails of the elevated track were held in place by crossbeams. The greatest possible clearance between the buckets and the crossbeams was a foot or fourteen inches and the buckets were ordinarily stopped at a height of only from four to six inches above the crossbeams. While the buckets were ascending rather rapidly, it was necessary for the signalman to cause them to be stopped and caught by a ratchet arrangement before they ascended high enough to forcibly strike or interfere with the machinery above and when they were sufficiently high to clear the crossbeams. The ratchet arrangement was such that, if one of the dogs missed a tooth on the ratchet wheel, the bucket would drop back about eight inches. The buckets were suspended by cables attached to the bails thereof, and the entire operation was a rapid one. *Held*, that this method of operation was such that danger inhered therein with respect to the buckets striking the crossbeams and tilting so as to cause them to spill their contents on the heads of the unprotected workmen beneath; and hence a finding that the plan of operation was not a reasonably safe one was justified. Sustar v. Constr. Co., 495.

13. **Same: Unsafe Plan of Operation: Incompetency of Fellow Servant: Consistency.** In an action for injuries to a servant working in a sewer trench, caused by a bucket, which was being elevated by means of a cable, striking a crossbeam and tilting over and precipitating stone it contained on plaintiff below, *held* that a theory of negligence that the servant in charge of the hoisting was negligent in failing to see that the bucket was hoisted to a sufficient height to clear the crossbeam was not inconsistent with a theory that the master was negligent in adopting a plan of operation which was not reasonably safe. Ib.

14. **Same: Defective Appliances: Unsafe Plan of Operation: Instructions.** In an action for injuries to a servant working in a sewer trench, caused by a bucket, which was being elevated by means of a cable, striking a crossbeam and tilting over and precipitating stone it contained on plaintiff below, the court instructed the jury that if they believed that the conveying machine was negligently constructed, arranged and used, in that the space between the bottoms of the buckets and the crossbeams was so small that there was immediate danger, in operating the buckets, of the lower ends thereof striking the crossbeams and spilling their contents, and that defendant knew, or by the exercise of ordinary care should have known, thereof, and that it was dangerous to plaintiff, while engaged in his work, for the buckets to be so operated, and that the buckets were apt to swing, tilt and strike the cross-beams and injure plaintiff, and that such negligence of defendant, if any, directly caused one of the buckets to strike a crossbeam and tilt and spill the rock and injure plaintiff, then their verdict should be for plaintiff. *Held*, that this instruction does not proceed upon the theory that defendant was negligent in using the type of machine used, but proceeds

Digitized by Google

upon the theory that the machinery was negligently arranged and placed, in that, as the parts were then correlated and operated, the space between the bottom of the buckets was too small for the safe operation of the machine, and that this was the cause of the injury; and hence it is not vulnerable to the objection that it was not supported by the evidence, in that the testimony showed that the machine was of standard type. Ib.

15. **Injury to Servant: Breaking of Ladder: Question for Jury.** In an action for injuries sustained by a servant by the breaking of a ladder which he was descending in the performance of his work, *held*, under the evidence, that the question of whether it was a part of his duties to see that the ladder was kept in a reasonably safe condition, as being part of the appliances placed in his charge, was for the jury. Pendegrass v. R. R., 517.

16. **Same: Assumption of Risk.** Where a ladder was a part of the premises upon and about which a servant was required to work and was the only method provided for ingress to and egress from a pit into which it was necessary for the servant to go, and the servant, prior to the time he was injured by reason of the ladder breaking while he was descending it, had been employed at the place only six days, *held*, under the evidence, that it cannot be said that he knew the condition of the premises or that he assumed the risk of any danger that might lurk therein which was not so obvious as to deter a man of ordinary prudence from using the same; it being the master's duty to exercise ordinary care to furnish him with a reasonably safe place in which to work, including reasonably safe means of access to the pit. Ib.

17. **Same: Simple Appliance.** A ladder, which was the only method provided for ingress to and egress from a pit into which it was necessary for a servant to go, was not a "common tool" but a fixed portion of the premises upon which and about which the servant was required to work, and hence the "simple appliance doctrine" was not applicable in an action by the servant for injuries sustained by reason of the ladder breaking while he was descending it. Ib.

18. **Appliances and Place of Work: Duty of Master to Inspect.** The master does not discharge his duty by furnishing his servant with a proper place in which and proper appliances with which to work, but it is his duty to inspect and make such examinations and tests, at reasonable intervals, as are reasonably necessary to ascertain the condition of the place and appliances. Ib.

19. **Injury to Servant: Defective Ladder: Question for Jury.** In an action for injuries sustained by a servant by the breaking of a ladder which he was descending in the performance of his work, *held*, under the evidence, that the jury might reasonably infer that the rung which broke had become insecurely fastened owing to its continued use through a long period of time, and that reasonably careful and frequent inspection thereof would have revealed the defect; *held, further*, that the evidence warranted an inference that the ladder as constructed was not a reasonably safe appliance for the use to which it was put; and hence it is *held* that whether the master was liable, was a question for the jury. Ib.

Digitized by Google

MASTER AND SERVANT—Continued.

20. **Same: Instructions.** In an action for injuries sustained by a servant by the breaking of a ladder which he was descending in the performance of his work, the court instructed, at the instance of plaintiff, that it was defendant's duty to furnish appliances that were reasonably safe, and that if defendant neglected such duty and there was a defective rung on the ladder and defendant knew thereof, or by ordinary care could have known of it, and by reason thereof the rung broke and caused plaintiff to fall while he was exercising ordinary care, he was entitled to recover. *Held*, that although the first part of the instruction charged that it was defendant's duty to furnish appliances that were reasonably safe and secure, the instruction is not to be condemned as imposing the liability of an insurer on defendant, in view of the fact that a subsequent part of the instruction required the jury to find that defendant either knew of the unsafe or insufficient condition of the appliance, or by the exercise of ordinary care could have known of the same. *Held, further*, that if the instruction, standing alone, could be said to be erroneous, it was cured by instructions given at defendant's request, requiring the jury to find that the ladder was in an unsafe and dangerous condition, and that defendant knew or by ordinary care could have known thereof, to warrant a recovery by plaintiff, and charging that if the defect in the rung was hidden and could not have been known to defendant by ordinary care, plaintiff could not recover, and that defendant was not an insurer against danger in the use of the ladder nor required to furnish plaintiff with the safest or most modern ladder to be used by him, but was only required to furnish plaintiff a ladder that was reasonably safe for the purposes intended. Pendegrass v. R. R., 517.

21. **Furnishing Appliances: Duty of Master.** The master is not an insurer of the absolute safety of appliances furnished the servant or of the place furnished him to work, the master's duty being simply to exercise ordinary care to that end. Ib.

22. **Injury to Servant: Assigning Minor Forbidden Work: Sufficiency of Evidence.** A railroad station agent directed an infant servant under him to get a hoop which the agent had utilized to deliver a message to a moving train, and the servant, while running along the station platform, with the train, to get the hoop, collided with a semaphore post on the platform, causing him to be thrown under the train and killed. It was the custom to pick up the hoops after they were thrown from the train and the employees were not expected to keep pace with a moving train to get the hoops before they were thrown off, nor was any order to that effect given to decedent at the time of the accident. *Held*, that decedent was not required by defendant railroad company to work about moving trains contrary to his parents' direction, and hence a recovery could not be had on such ground. Gray v. R. R., 541.

23. **Contributory Negligence: Choosing Unsafe Manner of Doing Work.** Although a servant, of his own free will, chooses an unsafe manner of doing his work or using the master's appliances, when other and safer ways could have been employed, he may still recover for injuries sustained from such use, unless the way he chose was so dangerous that an ordinarily prudent man would not have chosen it. Boehm v. Electric Co., 663.

Digitized by Google

MAXIMS. See Negligence, 27.

MINES AND MINING.

1. **Death of Miner: Defective Roof: Pleading: Failure of Proof.** A coal miner was killed by a rock falling from the roof of the mine. If he was killed at his working place, the mining company was not liable; if he was killed at a point not his working place, the company was liable. The petition alleged that he was killed at a point from fifteen to twenty-five feet away from his working place, while the proof tended to show that he was killed outside his working place but nearer to it than fifteen feet. It was *held* that this was not a failure of proof. Goode v. Coal Co., 207.

2. **Same: Instructions.** A petition, in an action for the death of a coal miner, alleged that he was killed at a place which was not his working place. It was *held* to be error to give an instruction for the plaintiff omitting to submit whether the place he was killed was not the place where he worked. Ib.

3. **Question of Law.** It is error to submit a question of law to a jury as to what part of a coal mine the law cast a duty upon the operator to repair. Ib.

4. **Injury to Miner: Defective Cage.** The plaintiff, a coal miner, sued to recover for personal injuries sustained, while being hoisted to the top of defendant's coal mine. The plaintiff, with five other miners, were being hoisted to the top of the shaft after their day's labor, when the hoist, which was in a defective condition, dumped the plaintiff out and he was injured. Held, that the plaintiff's injury was the direct result of a negligent breach of duty, which the defendant owed him. Ronchetto v. Coal Co., 215.

5. **Same: Statutes.** Under Sec. 8456, R. S. 1909, it is the duty of owner or operator of a mine "to provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." Ib.

6. **Same: Knowledge of Defects.** Knowledge, actual or constructive, of a defect in appliances must be brought home to the employer before a liability exists. Ib.

MONEY HAD AND RECEIVED.

1. **Nature of Remedy.** An action for money had and received lies for money which, *ex aequo et bono*, defendant ought to refund, for money paid by mistake, or got through imposition, express or implied, or through an undue advantage taken of plaintiff's situation, contrary to laws made for the protection of persons, under the circumstances. Sanitary Co. v. Reed, 164.

2. **Favored Remedy.** An action for money had and received is favored in this State. Ib.

3. **Pleading: Necessary Averments.** The petition, in an action for money had and received, unless on an account, must usually be special, setting forth the relation of the parties and the contract or wrong by means of which the money was received; and hence the petition, in an action to recover money which

Digitized by Google

MONEY HAD AND RECEIVED—Continued.

defendant claimed was paid him by plaintiff for services, should set out the relation of the parties and the contract or wrong out of which the right of action arose. Sanitary Co. v. Reed, 164.

4. **Same: Omission of Essential Averments: Remedy.** The failure of the petition, in an action for money had and received, to set out the relation of the parties and the contract or the wrong out of which the cause of action arose can be reached by a motion to make it more definite and certain, if not by demurrer. Ib.

5. **Same: Burden of Proof.** In an action for money had and received by defendant to plaintiff's use, where the answer, after denying each and every allegation of the petition not admitted, denied that defendant was indebted to plaintiff in the sum sued for, or any other sum, and admitted that, on the dates alleged, defendant received of plaintiff the sums set out, aggregating the amount sued for, and alleged that said sums were paid defendant as his compensation for services rendered plaintiff, and were not received on any other account whatsoever, it was error for the court to hold that the burden of proof was, at the outset, under the pleadings, upon defendant; this ruling losing sight of the distinction between burden of proof and preponderance of evidence. Ib.

MORTGAGES AND DEEDS OF TRUST. See Chattel Mortgages.

1. **Cancellation of Mortgage: Discharge of Mortgages: Principal and Surety.** The plaintiff instituted this action in equity to cancel a certain deed of land, which is in reality a mortgage executed by the grantor as surety for the payment of a debt of another. *Held*, that anything that would discharge a surety from personal liability to pay the debt of his principal would discharge his property from a lien securing his contract of suretyship. Hardwicke v. Barnes, 386.

2. **Same.** Where a mortgage is given to secure the debt of another, for which the mortgagor assumes the liability of a surety, any change in the form of a debt or the terms of payment, as by renewal, extension of time, or otherwise, not assented to by the mortgagor, will discharge the mortgage, unless the mortgage itself contains provisions authorizing such arrangements to be made. Ib.

MUNICIPAL CORPORATIONS. See Appellate Practice, 10; Special Tax Bill.

1. **Injury on Street: Embankments: Duty of City.** The plaintiff sued the defendants to recover for personal injuries sustained by his wife, caused by the negligence of the defendants in failing to guard an embankment and excavation in a public street which had been recently graded. The plaintiff's wife going home from a grocery store, in the dark, fell down the embankment, which was in its natural state, and was injured. *Held*, that a city is under no duty to travelers to fence off or otherwise guard portions of streets left in a state of nature. Robinson v. Parker-Washington Co., 211.

2. **Same.** A city lawfully exercised its governmental discretion to grade and prepare for use only the wagon roadway in part of the street. It is not required to grade and improve the

Digitized by Google

MUNICIPAL CORPORATIONS—Continued.

whole space and build sidewalks on it, and therefore is not liable for not having done so. Ib.

3. **Injury on Sidewalk: Instructions.** The plaintiff sued to recover for personal injuries sustained through the negligence of the defendant city. The plaintiff was crossing the street of the defendant city on a wooden crossing, when her foot went through the plank and she was injured. *Held*, that the instructions fairly presented the only real issue of fact in the case and there is no room for the thought that the jury did not understand the issue and address themselves to its solution. Willis v. Browning, 233.

4. **Injury on Sidewalk: Snow and Ice.** Where plaintiff's petition charged that a certain walk was dangerous and unsafe by reason of rough, knotty, uneven and slippery ridges of ice which had formed and remained for so long a time as to give notice to the city of the unsafe condition, and that she was thereby caused to fall and receive an injury, her recovery will not be defeated because her testimony shows, in addition to the facts supporting the above charge, that the walk itself was rough and uneven having been constructed of blocks of cement laid loosely upon the ground with large irregular cracks between them. If the accumulation of snow and ice formed an obstruction on the walk rendering it dangerous and not reasonably safe and was the direct cause of the fall, then the city cannot escape liability merely by showing that the dangerous condition was increased by the faulty construction of the walk. Best v. St. Joseph, 330.

NEGLIGENCE. See **Automobiles, 1; Master and Servant; Mines and Mining; Municipal Corporations, 1, 2, 3, 4; Physicians and Surgeons; Railroads.**

1. **What Constitutes.** The mere fact that all men are careless at times does not relieve any person from performing his duties with due care in the circumstances of the case. Reeves v. Lutz, 61.

2. **Degrees of Negligence.** Degrees of negligence are not recognized in this State. Ib.

3. **Municipal Corporations: Embankments.** The plaintiff sued the defendants to recover for personal injuries sustained by his wife, caused by the negligence of the defendants in failing to guard an embankment and excavation in a public street which had been recently graded. The plaintiff's wife going home from a grocery store, in the dark, fell down the embankment, which was in its natural state, and was injured. *Held*, that a city is under no duty to travelers to fence off or otherwise guard portions of streets left in a state of nature. Robinson v. Parker-Washington Co., 211.

4. **Same.** A city lawfully exercised its governmental discretion to grade and prepare for use only the wagon roadway in part of the street. It is not required to grade and improve the whole space and build sidewalks on it, and therefore is not liable for not having done so. Ib.

5. **Mines and Mining: Cages.** The plaintiff, a coal miner, sued to recover for personal injuries sustained, while being hoisted

Digitized by Google

NEGLIGENCE—Continued.

to the top of defendant's coal mine. The plaintiff, with five other miners, were being hoisted to the top of the shaft after their day's labor, when the hoist, which was in a defective condition, dumped the plaintiff out and he was injured. *Held*, that the plaintiff's injury was the direct result of a negligent breach of duty, which the defendant owed him. Ronchetto v. Coal Co., 215.

6. **Railroads: Trucks: Invitees.** A boy, 14 years old, while waiting on a railway station platform, for his father, who was expected to arrive on an incoming train, leaned against a station freight truck, which was loaded with sacked flour, and it tipped down to the floor catching and breaking his leg. The truck had been provided at each end with a short leg ending in a small wheel, but one of these legs had been broken off two or three months before, leaving that end without support. *Held*, that the defendant failed to maintain its station platform in a reasonably safe condition. Stark v. Express Co., 225.

7. **Same.** A person has a right to go on a station platform for the purpose of escorting an outgoing passenger or meeting one whose arrival is expected. To such a person the railroad company does not owe the extraordinary care it owes a passenger, but does owe him the duty of ordinary care to maintain its station building and platform in a reasonably safe condition. Ib.

8. **Municipal Corporations: Sidewalks.** The plaintiff sued to recover for personal injuries sustained through the negligence of the defendant city. The plaintiff was crossing the street of the defendant city on a wooden crossing, when her foot went through the plank and she was injured. *Held*, that the instructions fairly presented the only real issue of fact in the case and there is no room for the thought that the jury did not understand the issue and address themselves to its solution. Willis v. City of Browning, 233.

9. **Railroad Crossing: Duty to Look Both Ways and Listen.** A railroad crossing is a dangerous place and is itself a signal of danger. A traveller approaching it is, therefore, imperatively required by law to look carefully in both directions, at a convenient distance from the crossing and where the look will be effective, before venturing upon it, if, by looking, a train can be seen. And the duty to look is a continuing one until the crossing is reached. Not only is he required to look but also to listen. He must not venture blindly on the track without first using his senses of sight and hearing, and if, for any reason, his sight is obstructed that is all the more reason for a greater exercise of his sense of hearing. Osborn v. Railroad, 245.

10. **Same: Contributory Negligence.** While the statute, Sec. 3140, R. S. Mo. 1909, requires the bell to be rung 80 rods from the crossing and to be kept ringing until the crossing is passed, or the whistle to be sounded at said distance and to be sounded at intervals until the crossing is reached, and renders the railroad liable in damages for a failure to do so, yet the statute also provides that this will not preclude a showing that such failure was not the cause of the injury, and the rule of contributory negligence is not abrogated. So that even if the statutory signals are not given, if a person by exercising

Digitized by Google

ordinary care could have avoided injury and fails to do so, he cannot recover, since he is guilty of contributory negligence. Ib.

11. **Same: Right to Presume Signals Will be Given.** It is only where the person about to cross a railroad is paying attention, and can neither see nor hear anything indicating that a train is coming, that he can assume, without negligence, that, if one were coming, the signals would be given. But where a person can see and hear, or can do either, he cannot rely blindly upon any presumption that the signals will be given. He can neither close his eyes nor his ears, but must use the means of self protection given him. Ib.

12. **Same: Unusual Conditions: Foggy Weather: Presumption of Care on Part of Deceased.** Deceased was approaching a railroad crossing in an enclosed two wheeled cart traveling at the rate of four miles per hour. He had on a cap with the ear flaps partially pulled down. A glass window in front and one on each side enabled him to see in front and to the right and left. On a clear day for at least 100 feet before reaching the crossing he could see down the track for a quarter of a mile or further. No one saw the collision, and it is not known what deceased did in the way of looking and listening. There was no wind blowing. A fog prevailed to a varying extent, sometimes heavier, then lighter, and then settling again. It lay in strata, heavier at some periods of the day and in some places than at other periods and in other places. There was nothing to prevent deceased from hearing the train. It consisted of an engine and caboose with 23 cars loaded with coal, comprising a train of 1100 tons going 35 miles an hour, and ran over a trestle the north end of which was 240 feet of the crossing. All witnesses, who were where they could hear the train, heard it easily and distinctly at distances varying from a quarter to three quarters of a mile away and that within a few moments before the crossing was reached. No difficulty was had in locating the place and direction from whence the sound came and the character of the train. Of the witnesses who testified concerning the ability to see the train on account of the fog, two of them were plaintiff's witnesses, both of whom saw it a quarter of a mile away notwithstanding the fog, one of these saw it as it passed over the trestle. The third was not at a place where he could have seen the train but gave his opinion that it could not have been seen more than 50 yards away. Defendant had two witnesses who saw and heard it a quarter of a mile away, one of them just before it reached the crossing and looking along the same line deceased would have to look to see it. *Held*, that under these circumstances and this evidence the presumption cannot be indulged that deceased was in the exercise of ordinary care. For what all the witnesses, located more unfavorably than was deceased, heard, he could have heard had he been in the exercise of due care. Where the positive and uncontradicted facts show that if deceased had taken those precautions which the law required of him to both look and listen, he would have been aware of the approach of the train, the presumption of due care cannot stand. Ib.

13. **Same.** If, however, the fog obscured his view, this did not relieve deceased of negligence but rather served to increase the degree of care required of him to listen and otherwise satisfy himself that no train was approaching. Unusual conditions de-

Digitized by Google

NEGLIGENCE—Continued.

mand extra precautions. Ordinary care under normal conditions is not ordinary care under unusual conditions produced by dust, fog, snow and the like. Deceased's sight and hearing were both good. The train, according to all the evidence was making a great noise. If deceased had listened he could have heard what others heard, and in the presence of the undisputed fact that all others did hear there is no room for the presumption that deceased listened but did not hear and should be relieved from negligence because he failed to hear. Osborn v. Railroad, 245.

14. **Railroads: Statute Requiring Blocking of Switches: Meaning of Term "Yards."** In Sec. 3163, R. S. 1909, relating to the blocking of switches, the term "yards" includes the place or piece of ground surrounding a depot or station which is used to switch or stand cars thereon for the purpose of loading or unloading freight at that point and for other purposes connected with the railroad business transacted at such station. While the term "yard" may technically have a narrow meaning yet, as it in common parlance has a broader meaning, and there is nothing in the statute showing an intention to use the term in a limited sense, but on the contrary there is enough to indicate that the broad and general rather than the limited, meaning was intended, such term should be taken and considered as used in its usual ordinary, and general signification. George v. Railroad, 283.

15. **Same.** Said statute does not contemplate that a railroad company, erecting a switch after September 1, 1907, shall have a reasonable time, after putting such switch in use, in which to block it, but that it must be blocked when erected and put in use. So that, where a switch was erected and shown by all the evidence to have been in use after the statute was in force, a defense that the railroad had not had a sufficient time to block it after putting it in use, was properly stricken out. Ib.

16. **Same: Defense of Contributory Negligence.** Sec. 3164, R. S. 1909, takes away the defense of contributory negligence in a case based on the failure to obey the statute in reference to blocking. Ib.

17. **Boarding Moving Car at Elevated Station: No Fault Attributable to Motorman.** Where the same track at an elevated station was used by cars going in the same direction but to different destinations so that only those desiring to board a particular car would attempt to do so, the fact that a person is standing on the platform when a car approached is not sufficient to charge the motorman with notice that such person is intending to or will board the car when no signal or other intimation to that effect is given the motorman and the car does not stop but proceeds on its way. In such case, after the car has passed the regular stopping point for the discharge of passengers at such station, the motorman has a right to presume that the rear gate of the car is closed according to rules and that he can safely resume the usual speed attained between stations. To require the motorman to know that such person would under such circumstances attempt to board the car, when every intimation was to the contrary, would be requiring superhuman powers of him. Speaks v. R. R., 311.

18. **Same: Evidence.** Even if, by an answer to a question containing in its terms the location of the front end of the car

Digitized by Google

NEGLIGENCE—Continued.

with reference to the point at which a person was said to be standing on the platform, a witness appears to say that such person was standing by the side of the track as the front end of the car passed, so that the motorman saw or might have seen him, yet, where all the testimony of such witness shows clearly that the person was not standing at such point as the front end passed, but came upon said platform after the front end had passed the point in question, such answer to said former question will not be treated as being any substantial evidence of such fact. Ib.

19. **Same: Contributory Negligence.** Deceased went up a stairway to an elevated street railway station platform, thirty feet above the ground, shortly after midnight and sprang upon the rear step of a moving car that was leaving the platform. The motorman had no means of knowing that he would do so. The attempt to board the car was made within ten feet of a guard rail at the edge of the platform which came to within nine inches of the passing car. On the guard rail was a sign warning persons not to board the car while in motion. The gate to the vestibule of the car was closed or nearly so. Deceased got one foot on the step and the other on the vestibule floor and was holding on to the gate with one hand, to the handrail of the car with the other, his body outside of the gate. In this perilous position he fell or was struck and thrown to the pavement below. *Held*, that he was guilty of contributory negligence as matter of law and could not recover. And that aside from the element of contributory negligence there was no showing on the part of the motorman on which the case rested. Ib.

20. **Same: Boarding a Slowly Moving Car.** While it is not negligence as matter of law for an able bodied man to board a slowly moving car, and that question is usually one of mixed law and fact to be determined by the triers of the facts under instructions of the court, yet, this rule applies only in cases where the act is not attended by unusual and extraordinary dangers. It has no application where one boards a moving car upon an elevated platform at midnight within a few feet of the edge where is a guard rail or fence likely to strike and hurl him to the ground. Ib.

21. **Same: Proximate Cause of Fall.** The contention that deceased's negligence was not the proximate cause of the injury because it was sudden jerking of the car that caused him to fall and not his negligence in boarding it cannot be maintained where all the evidence shows that deceased never at any time attained to a safe position upon or in the car but at all times was in an exceedingly perilous situation which was brought about by his boarding the car under such dangerous circumstances. Ib.

22. **Relation of Carrier and Passenger: Where Such Status Arises.** Even in the case of a street railway there must be circumstances from which can be implied an offer to be carried on the part of the one desiring to become a passenger, and an acceptance on the part of the carrier before the relationship can be said to exist. If these do not appear the relation of carrier and passenger does not arise. The mere fact that one runs

Digitized by Google

NEGLIGENCE—Continued.

toward and jumps upon a moving street car does not create the relation in the absence of any showing of acceptance on the part of the carrier or of an invitation to board the car. Speaks v. R. R., 311.

23. **Same: Duty Owed to One Not a Passenger.** As the deceased did not obtain the status of a passenger, the only duty defendant owed him was to use ordinary care to avoid injuring him after it was discovered, or should have been discovered, that voluntarily and uninvited, he had placed himself in a place of danger. Ib.

24. **Municipal Corporations: Damages: Sidewalks: Snow and Ice.** Where plaintiff's petition charged that a certain walk was dangerous and unsafe by reason of rough, knotty, uneven and slippery ridges of ice which had formed and remained for so long a time as to give notice to the city of the unsafe condition, and that she was thereby caused to fall and receive an injury, her recovery will not be defeated because her testimony shows, in addition to the facts supporting the above charge, that the walk itself was rough and uneven having been constructed of blocks of cement laid loosely upon the ground with large irregular cracks between them. If the accumulation of snow and ice formed an obstruction on the walk rendering it dangerous and not reasonably safe and was the direct cause of the fall, then the city cannot escape liability merely by showing that the dangerous condition was increased by the faulty construction of the walk. Best v. St. Joseph, 330.

25. **Pleading: Variance.** A petition which charges one specific act of negligence will not support a recovery upon another and different ground. Ib.

26. **Automobiles: Frightened Horse.** The plaintiffs, who are husband and wife, sued to recover damages for the death of their infant child, which was thrown out of the buggy in which they were riding, when the horse became frightened at the defendant's automobile. The defendant's car made a sudden appearance at the crest of the hill on a public road, running at a rapid speed in a cloud of dust, and the horse though accustomed to automobiles, became uncontrollable and the plaintiffs were thrown out of the buggy and the child was killed. *Held*, that it is the duty of the autoist to use the highest degree of care that a very careful person would use under like circumstances to prevent injury or death to persons on or traveling over such public roads. Roberts v. Trunk, 358.

27. **Contributory Negligence: Foundation: Maxims.** The doctrine of contributory negligence is founded upon the maxim, "*In jure non remota causa sed proxima spectatur.*" Gray v. R. R., 541.

28. **Contributory Negligence of Children.** The standard by which the negligence of a child is to be measured is not the degree of care to be reasonably expected of an ordinary prudent man, but the degree of care to be reasonably expected of a child of his age; but where he is fully able to comprehend a danger, he may be declared guilty of negligence as a matter of law for failing to avoid it. Ib.

29. **Same: Facts Stated.** A railroad station agent directed an eighteen-year-old boy working under him to get a hoop which

Digitized by Google

NEGLIGENCE—Continued.

the agent had utilized to deliver a message to a moving train, and the boy, while running along the station platform, with the train, to get the hoop, collided with a semaphore post on the platform, situated about one hundred feet from his starting point, causing him to be thrown under the train and killed. *Held*, that decedent could have avoided running against the post, by the exercise of ordinary care, and hence he was guilty of negligence as a matter of law, barring a recovery for his death by his parents. Ib.

30. **Injury from Fall of Heavy Object: Contributory Negligence: Knowledge of Danger.** In an action for personal injuries sustained by plaintiff, caused by a heavy mass of iron, which was being hoisted by defendant, falling over against a scaffold on which plaintiff was walking, precipitating him into a pit, evidence *held* to show that there was nothing to warn plaintiff that it was unsafe for him to pass over the scaffold, near which the iron was being hoisted. Boehm v. Electric Co., 663.

31. **Contributory Negligence: Presumptions.** One who was working in a building in which defendant (a contractor) was moving a heavy mass of iron had the right to presume that defendant would exercise the degree of care required of persons handling heavy objects near where others are working. Ib.

32. **Injury from Fall of Heavy Object: Sufficiency of Evidence.** In an action for personal injuries sustained by plaintiff, caused by a heavy mass of iron, which was being hoisted by defendant, falling over against a scaffold on which plaintiff was walking, precipitating him into a pit, where it was shown that an eyebolt in the iron, to which the hoisting cable was attached, broke, evidence *held* to sustain a finding that defendant was negligent in attaching the cable to the eyebolt without testing it to determine whether it would bear the strain. Ib.

33. **Evidence: Proof of Subsequent Repairs.** In an action by an employee for personal injuries sustained from an unguarded machine at which he was working, it was reversible error for the court to admit evidence that the machine was guarded after the accident, offered for the purpose of showing that it could have been guarded, without calling the attention of the jury at the time to the fact that it was admitted for such specific purpose only. Minea v. Cooperage Co., 705.

NEGOTIABLE INSTRUMENTS. See **Bills and Notes.**

NEW TRIAL.

1. **Grounds for Granting: Opinion of Trial Judge: Appellate Practice.** A written opinion, prepared by the trial judge on sustaining a motion for a new trial, to be available as disclosing the grounds upon which a new trial was granted, must be spread of record in the case. Clarkson v. Garvey, 9.

2. **No Ground Assigned: Appellate Practice: Review.** Where the record does not disclose the ground upon which the trial court sustained a motion for a new trial, its action will be reviewed, on appeal, with reference to the several grounds set out in the motion, and such action will be upheld if it was a proper exercise of the court's discretion on any of such grounds, as that the verdict was against the weight of the evidence. Ib.

Digitized by Google

NEW TRIAL—Continued.

3. **Verdict Against Weight of Evidence.** It is proper to grant a new trial on the ground that the verdict is against the weight of the evidence, and an award of a new trial on that ground should be sustained, unless an abuse of judicial discretion appears. Clarkson v. Garvey, 9.

4. **Discretionary Grounds.** The award of one new trial will not be disturbed, on appeal, as for an abuse of discretion, if there is substantial evidence in the record in favor of, or such as will sustain, a verdict for, the party to whom the new trial is granted. Ib.

5. **Verdict Against Weight of Evidence.** In an action against the business agent and other officers of a labor union for conspiracy, by threatening plaintiff's employer with a strike unless he discharged plaintiff, as a result of which plaintiff lost his job, where the court granted defendants a new trial, without assigning any ground therefor, *held* that the evidence was sufficient to have sustained a verdict for such other officers, if a verdict had been returned in their favor, and hence the action of the trial court will be upheld on the theory that it awarded the new trial because the verdict was against the weight of the evidence—that being one of the grounds stated in the motion. Ib.

6. **Insufficiency of Evidence: Excessive Damages: Number of New Trials.** Under Sec. 2023, R. S. 1909, if one verdict has been set aside on the ground of insufficiency of the evidence, a second verdict cannot be set aside for the same cause; but one new trial may be granted to either party on that ground, or on the ground that the verdict is against the weight of the evidence, regardless of the number of new trials that may have been theretofore granted to the same party on other grounds, and hence where a new trial was granted to a defendant on the ground that punitive damages awarded against him were excessive, a new trial could be awarded him, at a subsequent trial, on the ground that the verdict was against the weight of the evidence. Ib.

7. **Verdict Against Weight of Evidence.** Where the plaintiff has the burden of proof and the defendant does not make any admission that would authorize a verdict against him, a verdict in his favor would be justifiable under the evidence, since the jury could reject plaintiff's evidence as being insufficient; and hence the granting of a new trial to the defendant would be upheld, on appeal, under the rule that such action will not be disturbed if the evidence will sustain a verdict for the party to whom the new trial was granted. Ib.

8. **Same.** In an action against the business agent of a local union for conspiracy, by threatening plaintiff's employer with a strike unless he discharged plaintiff, as a result of which plaintiff lost his job, evidence *held* sufficient to have sustained a verdict for defendant, if a verdict had been returned in his favor, and hence the action of the trial court in granting him a new trial, without assigning any ground therefor, will be upheld on the theory that it was granted because the verdict was against the weight of the evidence—that being one of the grounds stated in the motion. Ib.

9. **Trial Court's Discretion as to New Trial.** It is largely discretionary with the trial court whether or not it will grant

Digitized by Google

NEW TRIAL—Continued.

a new trial on the ground that the verdict is against the weight of the evidence; and only when such discretion has been clearly abused should it be interfered with. Cornell v. Insurance Co., 420.

10. **Verdict Against Weight of Evidence: Elements Necessary to Conclusion.** On a motion for a new trial on the ground that there is no evidence to support the verdict, to sustain such verdict, it is necessary that the evidence should not be contrary to physical fact or so impossible or improbable as to be unbelievable, and it must be substantial and possess some probative force when taken in connection with all the facts and circumstances; but all reasonable inferences to be drawn from the facts proven, stand for evidence. Ib.

11. **Same: Trial Court's Discretion.** That a trial court in weighing the evidence for and against the verdict concludes that the evidence for the verdict is so light as to be of no consequences were there no evidence contradictory, does not prevent that court from also finding that the opposing evidence outweighs it and warrants setting aside the verdict on the ground that the evidence does not support it. Ib.

12. **Verdict Against Weight of Evidence: Review.** In an action on an insurance policy, the evidence is reviewed and the granting of a new trial by the trial court on the ground that the verdict was against the weight of evidence is sustained. Ib.

13. **Same: Evidence Insufficient: Evidence Absent.** On a motion for a new trial, where more than one issue was involved in a single defense, the court may find that there was no evidence to support the verdict on one issue and that the finding on the other was against the weight of the evidence. Ib.

NONSUITS.

Right to Require Witness to Sign Deposition: Effect of Dismissal of Cause. After the dismissal of a case, the court has no power to enforce an order on a witness whose deposition had been taken, to show cause why he should not be required to sign the same. Curtis v. Dry Goods Co., 578.

NUISANCES. See **Injunctions, 16.**

NUNC PRO TUNC ENTRY. See **Judgments, 1.**

PARTIES. See **Corporations, 2; Injunctions, 2; Partnership, 1; Pleading, 3; Res Adjudicata, 1.**

PARTNERSHIP.

Actions: Parties. Actions by a partnership should be brought in the names of the individuals partners, and if brought in the firm name, there is a defect of parties. Manufacturing Co. v. Milling Co., 87.

"PATROLLING." See **Injunctions, 18.**

PAYMENT.

1. **Payment Under Mistake: Right of Recovery.** There may be relief on account of the payment of money under mistake of fact, but not in an independent action, for mistake of law, if there is no fraud. Chilton v. Harris, 267.

Digitized by Google

PAYMENT—Continued.

2. **Same.** While one may not have a right of action for mistake of law, in an independent suit, yet if under a void execution sale he makes a purchase, he may go into court in *that* action and have relief. Chilton v. Harris, 267.

PHYSICIANS AND SURGEONS.

1. **Care Required.** A surgeon is not required to exercise extraordinary care in performing an operation, but is required to exercise the care, skill and diligence that are ordinarily possessed by the average members of his profession who are in good standing in similar localities, regard being had also to the state of medical and surgical science at the time. Reeves v. Lutz, 61.

2. **Malpractice: Question for Jury.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, the mere fact that all of the expert witnesses who testified agreed that burns frequently occur from the use of the hot water bag under such circumstances was not sufficient to conclude the question of defendant's liability as a matter of law, in view of the fact that an ordinary inspection of the bag would have revealed the probabilities of its causing a burn. Ib.

3. **Same.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, and maintained in that position for two hours, *held* that defendant should have made an inspection to ascertain whether an injury was being inflicted by the bag, and hence the question of whether or not he was negligent was for the jury. Ib.

4. **Same.** A surgeon following the usual practice of placing hot water bags against the patient to sustain circulation during an operation, is bound to exercise ordinary care with respect to the use of the bags, as well as with respect to the operation itself. Ib.

5. **Same: Instructions.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, while there was evidence that patients sometimes struggle while undergoing an operation so as to bring parts of the body in contact with the bags, resulting in burns, there was no such evidence as to the particular patient, but on the contrary, the undisputed evidence established that defendant himself placed the bag against plaintiff. At the instance of defendant, the court instructed the jury that if defendant exercised reasonable skill and care in the operation, plaintiff could not recover, although, during the operation, the hot water bag came in contact with her body and caused a burn. *Held*, that the instruction was misleading, as implying that defendant discharged his full duty if he used proper care in performing the operation, since it was essential that defendant also exercise the usual skill and care with respect to preventing a burn from the hot water bags. *Held, further*, that the instruction was misleading, as indicating that the hot water bag accidentally came in contact with the patient. Ib.

6. **Same.** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical

Digitized by Google

PHYSICIANS AND SURGEONS—Continued.

operation was being performed, an instruction that the fact that defendant may have been guilty of inadvertence in the use of the hot water bag would not justify a verdict for plaintiff unless such inadvertence amounted to failure to use ordinary care and skill, was misleading, as charging that, although defendant was negligent, something more than such negligence was essential to make him liable; "inadventence" itself signifying inattention and negligence. Ib.

7. **Same: Instructions: "Accident."** In an action against a surgeon for burns inflicted by a hot water bag placed against a patient while a surgical operation was being performed, where it was shown that defendant himlsef placed the bag, an instruction that if the burn was the result of an accident, and not of defendant's negligence, plaintiff could not recover, was misleading, as submitting a theory of the case not justified by the evidence; the word "accident" meaning the happening of an unforeseen event, and not the happening of an event which defendant was bound to foresee. Ib.

8. **Same.** It is negligence for a surgeon to insert a drainage tube in a wound and allow such wound to completely heal up over the tube so as to require a surgical operation for its removal. Ib.

9. **Same: Pleading: Setting Out Contract of Employment.** In an action against a surgeon for malpractice, it is proper to set out the contract of employment as matter of inducement. Ib.

10. **Same: Evidence: Amount of Fee.** In an action against a surgeon for malpractice, where the petition properly set forth the contract of employment as matter of inducement, and then proceeded as in tort for defendant's negligence, and defendant's answer denied the employment so pleaded, evidence as to the amount of fee paid defendant by plaintiff was competent, as tending to prove the employment, and, although it might properly have been excluded on other grounds, it was admissible as against a general objection. Ib.

11. **Malpractice: Sufficiency of Evidence.** In an action against a surgeon for negligently closing a wound without removing therefrom a piece of gauze, after performing an operation on plaintiff, evidence *held* to establish that defendant gave plaintiff proper treatment, and hence it is *held* that plaintiff was not entitled to recover. Boner v. Nicholson, 146.

PLEADING. See **Bills and Notes, 4; Contracts, 6; Corporations, 1, 6; Damages, 13; Estoppel, 1, 2; Injunctions, 1, 2; Insane Persons, 1, 3; Interest; Justices' Courts, 4; Life Insurance, 4, 5, 6, 7; Money Had and Received, 3, 4, 5; Negligence, 25; Principal and Agent, 6; Railroads, 9; Writ of Error Coram Nobis, 1, 3, 4.**

1. **Caption: Suplusage.** The words "a corporation," appearing in the caption of a petition after the name of the plaintiff, may be disregarded as surplusage, where the body of the petition contains no averment that plaintiff is a corporation. Manufacturing Co. v. Milling Co., 87.

2. **Same.** The caption of a petition is no part of the petition. Ib.

Digitized by Google

PLEADING—Continued.

3. **Defect of Parties: How Raised.** Where a defect of parties appears on the fact of the petition, it must, under Sec. 1800, R. S. 1909, be taken advantage of by demurrer; but, if not so appearing, it must, under section 1804, be taken advantage of by answer, or the defect is waived. Manufacturing Co. v. Milling Co., 87.

4. **Demurrer: Waiver by Pleading Over.** Where a demurrer to a petition is overruled and defendant answers over, it is not necessary for the appellate court to notice the ruling on the demurrer. Sanitary Co. v. Reed, 164.

5. **Evidence: Failure of Proof.** A coal miner was killed by a rock falling from the roof of the mine. If he was killed at his working place, the mining company was not liable; if he was killed at a point not his working place, the company was liable. The petition alleged that he was killed at a point from fifteen to twenty-five feet away from his working place, while the proof tended to show that he was killed outside his working place but nearer to it than fifteen feet. It was held that this was not a failure of proof. Goode v. Coal Co., 207.

6. **Cause of Action: Appellate Court.** If a petition purports to state a cause of action on a statute and such statute is void for uncertainty, then no cause of action is stated and advantage may be taken of it for the first time in the appellate court. George v. Railroad, 283.

7. **Variance.** A petition which charges one specific act of negligence will not support a recovery upon another and different ground. Best v. St. Joseph, 330.

8. **Repugnant Counts.** Where two counts in a petition are inconsistent with and repugnant to each other, the plaintiff should not be suffered to go on with the case unless he abandons one or the other of such mutually destructive causes. Snyder v. Toler, 376.

9. **Variance: Mode of Objecting.** The party complaining of a variance between the pleading and the proof must not only interpose a timely and specific objection to the introduction of the evidence offered, but must file an affidavit of surprise, as required by Sec. 1846, R. S. 1909, and if he fails to do so, he will not be heard to complain in the appellate court. Lazarine v. Lazarine, 476.

10. **Same.** The party complaining of a variance between the pleading and the proof must not only interpose a timely and specific objection to the introduction of the evidence offered, but must file an affidavit of surprise, as required by Sec. 1846, R. S. 1909, and if he fails to do so, it is too late to complain in the appellate court. Bank v. Phillips, 488.

11. **Same.** Advantage cannot be taken, on appeal, of a variance between the pleadings and the proof, unless the objection was raised as provided by Sec. 1846, R. S. 1909. Zachra v. Mfg. Co., 683.

PLEDGES. See **Bailments.**

Digitized by Google

PRACTICE. See **Appellate Practice; Bills of Exceptions; Continuances; Costs; Courts; Crimes and Punishments; Depositions; Indictments and Informations; Jury; Justices' Courts; New Trial; Non-suits; Nunc Pro Tunc Entry; Pleading; Trial Practice; Reference.**

PRECATORY TRUSTS.

1. **Creation: Construction of Will.** The plaintiff sued to recover under a will on the ground that it created a precatory trust. The property was bequeathed by will to her stepmother, and it was sold to the defendant, who was a brother of her deceased father. The bequest under which the precatory trust is claimed to have existed is as follows: I give to my beloved wife, Ann C. Toler, all my property, real, personal and mixed, absolutely, knowing she will deal properly with my grandchild, Gertrude Snyder, and my son, Uriah Toer." *Held*, that these words of recommendation are an intimation of the wishes of the testator and not a command. Snyder v. Toler, 376.

2. **Same.** A precatory trust is not to be inferred from expressions of confiedence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust and especially no such trust will be implied when it clearly appears that the testator intended to give the devisee full discretion in the use of the property. Ib.

PRESUMPTIONS. See **Contracts, 16; Evidence, 2, 3, 5; Fraternal Beneficiary Association, 11; Negligence, 31; Railroads, 6, 7.**

PRINCIPAL AND AGENT. See **Corporations, 9.**

1. **Authority of Agent: Evidence.** The authority of an agent cannot be proved by his own declarations to third parties, although he is a competent witness to testify concerning the same, unless disqualified upon other grounds. Ment v. Haller, 466.

2. **Same: Appointment of Subagent.** As a general rule, an agent does not have the power to appoint a subagent or otherwise delegate his authority, unless he is expressly authorized to do so. Ib.

3. **Same: Sufficiency of Evidence.** In an action for the purchase price of produce shipped by plaintiff to defendant, *held* that it was a question for the jury, under the evidence, whether defendant's agent, with whom plaintiff made the contract of sale, had authority to make such a contract on behalf of defendant. Ib.

4. **Same: Evidence.** The existence of an agency or the extent of the agent's authority need not be established by direct and positive proof, but may be inferred from facts and circumstances, or implied from the course of dealing between the principal and agent; the scope of the agency being determined, not alone from what the principal told the agent to do, but from what he knows, or ought to know, in the exercise of ordinary care and prudence, concerning what the agent is doing in the premises. Ib.

5. **Same: Question for Jury.** Where there is any substantial evidence from which an agent's authority may be fairly and reasonably inferred, the question is for the jury. Ib.

Digitized by Google

PRINCIPAL AND AGENT—Continued.

6. **Sales: Action Against Principal: Instructions.** In an action for the purchase price of produce bought by plaintiff and shipped by him to defendant, plaintiff claimed that defendant's agent instructed him to buy and ship the produce to defendant until notified to stop, and that he would receive $1 fo reach hamper, plus a commission. Plaintiff waived his right to the commission, and sought to recover on the theory of an outright sale of the produce. *Held*, that an instruction that if the jury believed defendant requested and directed plaintiff to buy and ship the produce until notified to stop, and promised to pay plaintiff one dollar for every hamper so shipped, and plaintiff made the shipment, he is entitled to recover, was not erroneous as abandoning the theory of an outright sale and submitting the case on a contract of employment to purchase, with guaranty. Ment v. Haller, 466.

7. **Same.** In an action for the purchase price of produce, shipped by plaintiff to defendant under a contract which plaintiff claimed defendant's agent had made, an instruction that, in considering the question of the authority of the agent to make the contract, the jury might consider other acts and conduct of the agent of which the defendant had notice, and that if the agent bought other like produce on behalf of defendant without objection, and defendant paid for it, then the agent's authority to contract with plaintiff might be inferred, was not vulnerable to the objection that it singled out evidence, nor to the objection that it charged the jury that if the agent had authority to purchase produce for defendant, then the jury could infer that he had authority to employ someone else to purchase the same and to guarantee the net proceeds. Ib.

8. **Authority of Agent: Sufficiency of Evidence.** In an action for the price of goods sold and delivered to an agent of a branch house of defendant mercantile company, evidence *held* to sustain a finding that the agent had authority to order goods for defendant. Drug Co. v. Grocer Co., 676.

9. **Same: Evidence: Custom and Usage.** In an action for the price of goods sold and delivered to an agent of a branch house of defendant mercantile company, where the issue was whether the agent had authority to order the goods and bind defendant for the price, evidence that the purchase involved was such a large one that it was out of the ordinary line of business of an agent of the character of the one acting for defendant, was properly excluded, in the absence of evidence tending to show that plaintiff had knowledge of the custom, especially where there was testimony that defendant's vice-president had stated that the agent had authority to make the purchase in question. Ib.

10. **Fraud of Agent and Third Party: Rights of Principal.** If a third party contracting with an agent agrees to pay him a commission or other reward for making or bringing about the contract, or agrees to give him a part of the price to be paid by the principal, the contract is voidable at the option of the principal, but it is not void, and the third person cannot avoid it if the principal chooses to hold him. Meyer v. Promotion Co., 695.

11. **Same: Bailments.** In an action for the value of a horse which was bailed to defendant through its agent and not

Digitized by Google

PRINCIPAL AND AGENT—Continued.

returned to plaintiff, where plaintiff admitted that he and the agent had a secret understanding by virtue of which a certain part of the hire paid by defendant was to be given to the agent by plaintiff, *held* that plaintiff was not entitled to recover, since the secret agreement was a fraud upon defendant, relieving it from liability as bailee. Ib.

PRINCIPAL AND SURETY. See **Mortgages and Deeds of Trusts, 1, 2.**

1. **Bonds: Original Undertaking or Mere Surety: Liability of Obligors.** The defendants came into possession of a publishing company which had a lease on a building, the ground floor of which had been placed on a level three feet above the street grade to suit the peculiar needs of the publishing company. The owner of the building had been given a lien on a printing press to secure the performance of the terms of the lease. Defendants desired to sell the press, and, in order to obtain a release of the lien, gave a bond to the owner of the building to pay the cost (to the extent of $2500) of restoring the ground floor to the street level should the lease be terminated or no new tenant be secured at the end thereof who would use the building with the floor thus raised. At the end of the term no new tenant could be secured who would use the building with the floor thus raised above the street level. Plaintiff reduced the front third of the floor to the street level, the second third was lowered a part of the way and the rear one third was left as it was. The expense of doing this was much less than if she had lowered the entire floor to the full street level, but was greatly in excess of the amount of the bond. She then sued defendants on the bond. *Held*, that the bond was an original undertaking on the part of defendants, and they are not mere sureties for the publishing company; that their liability thereon is not *strictissimi juris;* and that plaintiff's failure to lower the entire floor did not release the obligors. Minor v. Woodward, 333.

2. **Same.** A surety may contract as a principal and by doing so will renounce the right of setting up a defense arising out of the relation of principal and surety. Ib.

3. **Discharge of Surety: Satisfaction of Judgment.** When a creditor knows that one occupies the relation of surety to the principal debtor and notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken and which he otherwise would have taken, he is discharged. Lewis v. Smith, 348.

4. **Same: Worthless Check.** The mere acceptance by the creditor of a worthless check given by the principal obligor will not discharge the sureties when it is not shown and does not appear that the securities were injured. Ib.

QUANTUM MERUIT. See **Building Contracts, 3; Corporations, 3, 4.**

QUIETING TITLE. See **Statute of Limitations, 4.**

Digitized by Google

RAILROADS. See Master and Servant, 22; Negligence, 29; Street Railways.

1. **Injury on Station Platform: Liability of Defendant.** A boy, 14 years old, while waiting on a railway station platform, for his father, who was expected to arrive on an incoming train, leaned against a station freight truck, which was loaded with sacked flour, and it tipped down to the floor catching and breaking his leg. The truck had been provided at each end with a short leg ending in a small wheel, but one of these legs had been broken off two or three months before, leaving that end without support. *Held*, that the defendant failed to maintain its station platform in a reasonably safe condition. Stark v. Express Co., 225.

2. **Same.** A person has a right to go on a station platform for the purpose of escorting an outgoing passenger or meeting one whose arrival is expected. To such a person the railroad company does not owe the extraordinary care it owes a passenger, but does owe him the duty of ordinary care to maintain its station building and platform in a reasonably safe condition. Ib.

3. **Railroad Crossing: Duty to Look Both Ways and Listen.** A railroad crossing is a dangerous place and is itself a signal of danger. A traveller approaching it is, therefore, imperatively required by law to look carefully in both directions, at a convenient distance from the crossing and where the look will be effective, before venturing upon it, if, by looking, a train can be seen. And the duty to look is a continuing one until the crossing is reached. Not only is he required to look but also to listen. He must not venture blindly on the track without first using his senses of sight and hearing, and if, for any reason, his sight is obstructed that is all the more reason for a greater exercise of his sense of hearing. Osborn v. R. R., 245.

4. **Same: Statutory Signals.** While the statute, Sec. 3140, R. S. Mo. 1909, requires the bell to be rung 80 rods from the crossing and to be kept ringing until the crossing is passed, or the whistle to be sounded at said distance and to be sounded at intervals until the crossing is reached, and renders the railroad liable in damages for a failure to do so, yet the statute also provides that this will not preclude a showing that such failure was not the cause of the injury, and the rule of contributory negligence is not abrogated. So that even if the statutory signals are not given, if a person by exercising ordinary care could have avoided injury and fails to do so, he cannot recover, since he is guilty of contributory negligence. Ib.

5. **Same: Right to Presume Signals Will be Given.** It is only where the person about to cross a railroad is paying attention, and can neither see nor hear anything indicating that a train is coming, that he can assume, without negligence, that, if one were coming, the signals would be given. But where a person can see and hear, or can do either, he cannot rely blindly upon any presumption that the signals will be given. He can neither close his eyes nor his ears, but must use the means of self protection given him. Ib.

6. **Same: Unusual Conditions: Foggy Weather: Presumption of Care on Part of Deceased.** Deceased was approaching a

Digitized by Google

railroad crossing in an enclosed two wheeled cart travelling at the rate of four miles per hour. He had on a cap with the ear flaps partially pulled down. A glass window in front and one on each side enabled him to see in front and to the right and left. On a clear day for at least 100 feet before reaching the crossing he could see down the track for a quarter of a mile or further. No one saw the collision, and it is not known what deceased did in the way of looking and listening. There was no wind blowing. A fog prevailed to a varying extent, sometimes heavier, then lighter, and then settling again. It lay in strata, heavier at some periods of the day and in some places than at other periods and in other places. There was nothing to prevent deceased from hearing the train. It consisted of an engine and caboose with 23 cars loaded with coal, comprising a train of 1100 tons going 35 miles an hour, and ran over a trestle the north end of which was 240 feet of the crossing. All witnesses, who were where they could hear the train, heard it easily and distinctly at distances varying from a quarter to three quarters of a mile away and that within a few moments before the crossing was reached. No difficulty was had in locating the place and direction from whence the sound came and the character of the train. Of the witnesses who testified concerning the ability to see the train on account of the fog, two of them were plaintiff's witnesses, both of whom saw it a quarter of a mile away notwithstanding the fog, one of these saw it as it passed over the trestle. The third was not at a place where he could have seen the train but gave his opinion that it could not have been seen more than 50 yards away. Defendant had two witnesses who saw and heard it a quarter of a mile away, one of them just before it reached the crossing and looking along the same line deceased would have to look to see it. *Held*, that, under these circumstances and this evidence, the presumption cannot be indulged that deceased was in the exercise of ordinary care, for what all the witnesses, located more unfavorably than was deceased, heard, he could have heard, had he been in the exercise of due care. Where the positive and uncontradicted facts show that if deceased had taken those precautions which the law required of him to both look and listen, he would have been aware of the approach of the train, the presumption of due care cannot stand. Ib.

7. **Same.** If, however, the fog obscured his view, this did not relieve deceased of negligence but rather served to increase the degree of care required of him to listen and otherwise satisfy himself that no train was approaching. Unusual conditions demand extra precautions. Ordinary care under normal conditions is not ordinary care under unusual conditions produced by dust, fog, snow and the like. Deceased's sight and hearing were both good. The train, according to all the evidence, was making a great noise. If deceased had listened, he could have heard what others heard, and in the presence of the undisputed fact that all others did hear, there is no room for the presumption that deceased listened but did not hear and should be relieved from negligence because he failed to hear. Ib.

8. **Statute Requiring Blocking of Switches: Meaning of Term "Yards."** In Sec. 3163, R. S. 1909, relating to the blocking of switches, the term "yards" includes the place or piece of ground surrounding a depot or station which is used to switch or stand cars thereon for the purpose of loading or unloading

Digitized by Google

RAILROADS—Continued.

freight at that point and for other purposes connected with the railroad business transacted at such station. While the term "yard" may technically have a narrow meaning yet, as it in common parlance has a broader meaning and there is nothing in the statute showing an intention to use the term in a limited sense, but on the contrary there is enough to indicate that the broad and general rather than the limited, meaning was intended, such a term should be taken and considered as used in its usual ordinary, and general signification. George v. Railroad, 283.

9. **Same.** Said statute does not contemplate that a railroad company, erecting a switch after September 1, 1907, shall have a reasonable time, after putting such a switch in use, in which to block it, but that it must be blocked when erected and put in use. So that, where a switch was erected and shown by all the evidence to have been in use after the statute was in force, a defense that the railroad had not had a sufficient time to block it after putting it in use, was properly stricken out. Ib.

10. **Same: Defense of Contributory Negligence.** Section 3164, R. S. 1909, takes away the defense of contributory negligence in a case based on the failure to obey the statute in reference to blocking. Ib.

11. **Statute Relating to Blocking Switches: Validity.** The statute requiring railroad companies to provide the "best known appliance to block switches in their yards to prevent, so far as possible, the feet of employees or other persons from being caught therein," is not void, either for uncertainty or impossibility of performance. Ib.

REFERENCE. See Jury.

1. **Compulsory Reference: Right to Accept Part and Reject Part of Report.** Notwithstanding an order of reference, in an action at law requiring the examination of a long account, is made by consent, yet, in view of the fact that such an action is the subject of compulsory reference, under Sec. 1996, R. S. 1909, the trial court may review the report of the referee and confirm it in part and reject it in part; it being only in actions at law that are not the subject of a compulsory reference that the court must either accept or reject the report *in toto*. Valleroy v. Enright, 553.

2. **Account: What Constitutes.** The mere fact that certain items set forth in a counterclaim accrue as damages for the breach of a building contract because of defective materials and inferior workmanship does not remove them from the category of the account contemplated by Sec. 1996, R. S. 1909, relating to the reference of causes, since they sound in contract. Ib.

REPLEVIN.

Chattel Mortgages: Release of Lien: Acceptance of Other Security. The owner of notes secured by liens on personal property agreed with the mortgagor to release the liens, if the latter would sell the property at public auction and pay the notes out of the proceeds of such sale. The property was accordingly sold for more than the amount due on the notes and a part

Digitized by Google

REPLEVIN—Continued.

of the proceeds was paid by the clerk of the sale to the owner of the notes, who applied a portion of said amount to the payment of an unsecured open account, which he had against the mortgagor. The latter asserted that the proceeds of the sale in excess of the amount due on the notes belonged to and should be paid to him. This action followed. *Held*, that the special interest of the owner of notes in the property securing the notes was satisfied by the sale and he must look to the trustee for the fund he elected to accept as security in lieu of his liens. Love v. Scott, 351.

RES ADJUDICATA.

Conclusiveness of Judgment Rendered in Another Case: Parties. The fact that a minor employee, in an action against his employer for personal injuries, recovered damages for expenses incurred by him, because of the injuries, would not prevent his father, in another action for loss of services, medical expenses, etc., from recovering expenses incurred by him as a result of such injuries to his son, even though the latter recovered greater damages for such items than he should. Minea v. Cooperage Co., 705.

ROADS. See **Highways; Mandamus.**

Public Roads: Appeal: Township Board: Notice. On appeal to the county court from the order of a township board changing a public road, the appellant must give written notice to the appellee 10 days before the county court convenes; and if he does not do so the appellee may move to dismiss the appeal; and whether there is such notice must be shown on trial of the motion. State ex rel. v. Urton et al., 264.

SALES. See **Judicial Sales.**

Modification and Substitution: What is Not. A contract of sale is not modified nor substituted by a new one, where such contract provided for payment of freight by the vendor and upon the arrival of the goods, freight not having been prepaid, the vendor's agent induced the vendee to accept the goods and pay the freight as so much of the purchase price to be credited on such purchase price when the freight bill was sent to the vendor. Steele Co. v. Cottengin, 392.

SPECIAL TAX BILLS.

1. **Assessments: Frontage on Streets.** The plaintiff sued to enforce the lien of a special tax bill against the land of the defendants. The defendants' land did abut on the street, which was paved, but only to the extent of a very small proportion, seventeen feet, of a large tract which was all taxed for the improvement. *Held*, that our statutes do not contemplate the division for the purposes of a special assessment, of single lots or parcels of land, but the whole tract in so far as it lies within the area of the assessment is subject to the assessment, if any portion of it abuts upon the street where the improvement is made. Construction Co. v. Investment Co., 229.

2. **Definitions: Frontage.** The term "frontage" is but an expression of the front foot rule and under such rule no other property than that abutting on the street improved can be assessed. Ib.

Digitized by Google

SPECIAL TAX BILLS—Continued.

3. **Estimate of Cost: Exceeding Estimate.** Where the city charter does not limit or restrict the actual cost of a street improvement to the estimate thereof by the engineer, nor provide that the bills shall be invalid if the estimate is not accurate, the fact that the actual exceeds the estimated cost will not invalidate the tax. Under such a charter or statutory provisions, the estimate is advisory merely. It would be unjust, in such case, to deprive the contractor of the rewards of his work, after he has honestly and faithfully performed his contract, merely because the advice given by the city's engineer was not accurate. Kelley v. Morton, 296.

4. **Paving: Choice of Material: Continuance.** Where the charter of a city of the second class empowered a board of public works to formulate and propose to the city council an ordinance for paving a street, the charter requiring the proposal to be continued by the board for fifteen days before transmitting to the council in which time the majority of the property owners might make choice of the material for paving and which choice should be put into the ordinance, the board, had no power to propose such ordinance, nor the council to pass it until the full fifteen days had expired. And where the board did propose an ordinance without allowing that time for choice of material, a tax bill issued for such paving is void. Cushing v. Petrie, 326.

5. **Board of Public Works: Ordinance.** Where a majority of property owners on a street petitioned for paving it, naming the material, and where the charter of the city provided that the board of public works should hear objections to the petition and if overruled, continue the matter for 15 days so that a majority of the property owners might select the material for the paving, it was *held*, that refiling the original petition by the board without direction from the petitioners and then, before the expiration of the 15 days of continuance, proposing a paving ordinance to the city council was unauthorized and tax bills issued for such paving were void. Ib.

STATUTE OF LIMITATIONS.

1. **Five-Year Statute: Fraud and Deceit.** The petition, in an action for the value of certain shares of stock and for an accounting, alleged a purchase by defendant, as agent and trustee for himself, plaintiff, and three others, of 185 shares of stock of a corporation of which defendant and plaintiff were both stockholders; that he paid the purchase price with borrowed money, for which he gave his note, pledging the shares as security; that thereafter the corporation consolidated with another corporation; that defendant, acting as such agent and trustee, exchanged the 185 shares for stock in the consolidated company; that he notified plaintiff that his proportion thereof was 37 shares; that, relying upon this representation, it was agreed that plaintiff would take and pay for 25 shares, as he was not able to take the whole 37 shares; that the 185 shares were exchanged for 277½ shares in the consolidated company, and plaintiff was therefore entitled to 12½ shares additional; that defendant falsely and fraudulently stated to plaintiff that he was giving and transferring to him his full pro rata share; that plaintiff, having been long associated with defendant, reposed implicit faith and confidence in

Digitized by Google

STATUTE OF LIMITATIONS—Continued.

him, and fully relied upon such representation, and accepted and paid for the 25 shares, believing it to be true; that such representation was false and fraudulent, as defendant then held 12½ extra shares, which were the property of plaintiff; that defendant fraudulently concealed the truth from plaintiff, held the stock, and converted it to his own use, and thereafter concealed the truth and continued to secretly hold and use the stock or its proceeds; and that plaintiff had no knowledge whatever that defendant had concealed the fact of his having received such 12½ shares until within eight weeks before the filing of the suit, whereupon he demanded the stock or its value, and defendant again falsely represented that plaintiff had been given his full share of the stock. The transfer of such stock to plaintiff was more than five years before the bringing of the suit. Defendant pleaded the five-year statute of limitations, and the cause was submitted on an agreed statement, which did not show any act of concealment with any more particularity than the petition. *Held*, that a motion for judgment on the pleadings was properly sustained, as the petition did not show sufficient facts to bring the case within subdivision 5 of Sec. 1889, R. S. 1909, providing that, in actions for relief on the ground of fraud, the cause of action is to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. Heisler v. Clymer, 110.

2. **Same.** Under the fifth subdivision of Sec. 1889, R. S. 1909, providing that actions for fraud must be commenced within five years, but that the cause of action in such case shall be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud, the action must be brought within five years, and not within ten years, after the discovery of the facts constituting the fraud. Ib.

3. **Writ of Error Coram Nobis.** The Statute of Limitations does not run against a writ of error *coram nobis;* and though a judgment against an insane person attacked by such writ has been rendered more than five years, yet if only a period of eighteen months has passed since the appointment of a guardian before he brings his action, there is no laches. Gibson v. Pollock, 188.

4. **Suit to Quiet Title.** In an equitable action, prosecuted by the holder of an equitable title, to quiet title is in the nature of a real action which could be barred only by ten years adverse possession, the statute does not begin to run until the dispossession of the equitable holder. Hardwicke v. Barnes, 386.

5. **Removal of Bar: Promissory Notes: Part Payment.** Indorsements on a note do not prove themselves and the mere production of the note, otherwise barred by limitation, with credits indorsed thereon under dates which apparently revive or prolong the life of the note until after the time suit is brought, will not, without further proof, make a prima-facie case and remove the bar of limitations. Ray v. McConnell, 400.

6. **Same: Partial Payment, When Sufficient.** Although a part payment on a note removes the effect of the Statute of Limita-

Digitized by Google

STATUTE OF LIMITATIONS—Continued.

tions, yet, where one relies for proof of such payment on an indorsement on the note, there must also be proof that the indorsement was made either by or for the holder of the note or with the knowledge and consent of the maker and if made by or for the holder, that it was actually placed on the note at a time when it was against the interest of such holder to make it, that is while the note was yet alive. Ray v. McConnell, 400.

7. **Same: Evidence Reviewed.** Evidence examined and considered sufficient to establish a prima-facie case for the jury of partial payments on a promissory note, sufficient to remove the bar of the Statute of Limitations. Ib.

STATUTES. See **Foreign Statutes; Pleading, 6.**

1. **Uncertain or Impossible to Execute: Void.** A statute may be couched in such unintelligible, contradictory or inconsistent terms, as will render it void. And though its terms are certain and intelligible, yet, on the face of it, compliance may be impossible and for that cause also it will be void. George v. Railroad, 283.

2. **Best Known Appliances and Inventions: Validity.** A statute requiring railway companies to provide the "best known appliances or inventions to block switches in railroad yards to prevent as far as possible the feet of employees or other persons from being caught therein," is not void, either for uncertainty, or impossibility of compliance. Ib.

3. **Construction.** That which is within the true intent and spirit of a statute is as much a part of it as its letter. Curtis v. Dry Goods Co., 578.

STATUTES CITED AND CONSTRUED.

Revised Statutes 1899.

Section 645, see page 186.
10346, see page 265.
10347, see page 265.

Revised Statutes 1909.

Section 10, see page 440.
74, see pages 241, 242.
83, see page 360.
114, see pages 438, 439, 440.
115, see pages 438, 439, 440.
116, see page 440.
220, see page 446.
289, see pages 442-444.
290, see page 444.
1800, see pages 92-281.
1846, see page 492.
1874, see page 185.
1878, see page 484.
1889, see pages 118, 119, 120, 121.
1892, see page 392.
1980, see page 487.
1985, see page 91.
1996, see page 556.
2021, see page 492.
2023, see page 19.
2032, see page 238.
2038, see page 487.
2040, see page 279.
2041, see page 279.
2048, see page 210.
2082, see page 709.
2083, see page 279.
2180, see page 101.
2183, see page 101.
2184, see page 101.
2415, see pages 101-102.
2472, see page 650.
2793, see page 186.

Digitized by Google

STATUTES CITED AND CONSTRUED—Continued.

3330, see page 196.
3140, see page 256.
3163, see pages 285-292.
3164, see pages 285-291.
3881, see page 651.
3882, see page 651.
3884, see pages 650-651.
5309, see page 345.
5398, see page 345.
5425, see pages 362, 363, 547.
5426, see page 547.
6281, see page 301.
6282, see page 301.
6356, see page 590.
6361, see page 590.
6384, see page 586.
6403, see page 588.
6944, see page 429.
7181, see page 138.
7238, see page 346.
7240, see page 346.
7579, see page 487.
7580, see pages 484-485.
7584, see page 485.
8338, see page 299.
8456, see page 223.
8517, see page 360.
8519, see page 360.
8523, see pages 360-362-363.
8709, see page 231.
9972, see page 201.
9973, see page 201.

Session Laws.

Laws 1907, page 253, see page 587.
Laws 1911, page 141, see page 105.
Laws 1913, page 216, see page 237.

Laws of Missouri Territory.

December Session, 1815.

Sec. 1, page 32, see page 205.

STREET RAILWAYS. See **Carriers of Passengers, 2, 3, 4, 5, 6, 7, 8; Railroads.**

STREETS. See **Highways; Roads; Injunctions, 14, 15, 16, 18.**

TAXICAB COMPANIES. See **Appellate Practice, 23; Carriers of Passengers, 9, 10, 11, 12, 13, 14, 17, 19.**

TELEGRAPHS AND TELEPHONES.

1. **Telegram: Delivery: Promptness: Penalty: Agent.** The sender of a telegram handed it to the telegraph company's agent to transmit and have delivered at the same time paying the charges asked by the agent. The message was not promtly delivered to the addressee as required by the statute (Sec. 3330, R. S. 1909) and it was held that the agent's count of the words in the message and his statement and acceptance of the charge therefor was binding on the company, and it was therefore liable to the penalty of the statute for not delivering. Higbee v. Telegraph Co., 195.

2. **Words "alright" and "all right:" Count: Charge: Agent.** Whether the expression "alright" in a telegraph message should be counted as one word or as two words, "all right," is a matter to be determined by the telegraph company's agent who received the message for transmission and fixes and collects the charge and his count and charge will bind the company. Ib.

3. **Statute: Rules: Agent: Estoppel.** The statute requiring prompt delivery of telegraph messages and imposing a penalty for

Digitized by Google

TELEGRAPHS AND TELEPHONES—Continued.

failure to do so is conditioned on the prepayment of proper charges demanded under the rules of the company. But if the company's agent counts the words of the message and announces the charge to the sender which the latter pays him, the company, in avoidance of the penalty for nondelivery, cannot claim that the proper charge was not paid to it. Higbee v. Telegraph Co., 195.

TRADE MARKS AND TRADE NAMES.

1. **Trade Names and Unfair Competition.** Trade names differ from trade-marks in that no exclusive proprietary interest in the former is required to maintain injunction against infringement, while it is necessary in the case of a trade-mark. Trade names are divided into exclusive and nonexclusive trade names. The former are protected upon the same principles that trade-marks are. Nonexclusive trade names are such as are *publici juris*, open to or exercisable by all persons in their primary sense, but which in a secondary sense have come to indicate the business of a particular trader. Furniture Hospital v. Dorfman, 302.

2. **Same: Nonexclusive Trade Name in Its Secondary Meaning.** Words which, in their primary meaning are not capable of exclusive appropriation as a trade-mark, may, nevertheless, by long use in connection with the business of a particular trader come to be understood by the public as designating the business of that particular trader. And if plaintiff can prove that the name he has chosen has been so exclusively identified with his business as to indicate his business alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof he is not entitled to relief. Ib.

3. **Same.** Unfair competition consists in passing off, or attempting to pass off, the goods or business of one person as and for the goods or business of another. Ib.

4. **Evidence.** No inflexible rule can be laid down as to what will constitute unfair competition by the unlawful use of a nonexclusive trade name in its secondary meaning. It is always a question of fact. The question in every case is whether or not, as a matter of fact, the name adopted by defendant has previously come to indicate plaintiff's business and whether the public is likely to be deceived. Ib.

5. **Same: Mere Descriptive Terms.** Names which are mere descriptive terms of the business and generic in their nature are not capable of being appropriated. If the name sought to be protected is one which may be used by everyone in an honestly descriptive and nondeceptive manner the court may declare as matter of law, that there can be no unfair competition in the use of such terms. Ib.

6. **Same.** But even descriptive terms may by long use become identified in the minds of the public with a particular trader's business, and in such cases it is unfair competition for a subsequent trader to use them in such manner as to pass off his business for that of the other. If the name be an odd, unusual, fanciful or striking name, it may be appropriated by a trader even though it be descriptive of the business he carries on. If, for its description, it depends upon a figure of speech or an association of ideas, and is not merely a literal

Digitized by Google

TRADE MARKS AND TRADE NAMES—Continued.

description of the business, it is a name that is subject to appropriation within the limits of the territory that the business serves. An unusual, novel name, likely to catch the public fancy and stick in the memory is of great value in advertising a business and is protected. Even though it be descriptive of the business, it is not necessary for the subsequent trader to use such terms in such a manner as to give his business the same catchy and attractive name, for it is easy to use descriptive terms in some other honestly descriptive way. Ib.

7. **Same: Demurrer to Evidence.** The question of unfair competition being one of fact, a demurrer should not be sustained, where the petition is otherwise sufficient, unless the court can say, as matter of law, that the name sought to be protected is merely descriptive of the business and is so entirely devoid of novelty, originality and striking characteristics as not to be capable of being appropriated as a trade name. Ib.

8. **Same: Name "Furniture Hospital."** The court cannot say, as matter of law, that the name "Furniture Hospital" is so purely descriptive and so usual and common as to be incapable of appropriation as a nonexclusive trade name with a secondary meaning. Ib.

9. **Same: Addition of Other Words.** The mere addition of geographic names such as "New York," "Africa," "Asia," etc., cannot be declared as a matter of law to constitute such a difference in the names as to make the name so altered free from complaint. Similarity as well as precise identity deceives, and a nice discrimination in names cannot be expected from a busy public. And it is by the adoption of some such addition rendering the name similar, but not identical, that unfair competition is usually attempted to be perpetrated. Ib.

TRIAL PRACTICE. See **Appellate Practice, 2, 3, 4, 7, 26, 30; Bills of Exception, 1; Constitutional Questions, 1; Continuances, 1, 2; Damages, 9; Evidence, 21; Judgments, 1; Jury; Physicians and Surgeons, 10; Pleading, 3, 9, 10; Reference.**

1. **Credibility of Witnesses: Question for Jury.** The weight of the evidence and the credibility of the witnesses giving it are questions for the jury. Lazerine v. Lazerine, 476.

2. **Conflicting Evidence: Question for Jury.** Where there is evidence on both sides of a disputed issue of fact, the question is for the jury. Pendegrass v. R. R., 517.

3. **Credibility of Witnesses: Question for Jury.** The weight and value of the testimony and the credibility of the witnesses giving it are questions for the jury. Hay v. Fire Clay Co., 567.

4. **Same.** The credibility of the witnesses and the value and the weight to be given to their testimony are questions for the jury. Keiley v. Knights of Father Matthew, 608.

5. **Intention: Question for Jury.** The question of intention not clearly expressed is one *in pais*, to be ascertained and determined by the triers of fact, and not declared as a conclusion of law. Ib.

Digitized by Google

TRIAL PRACTICE—Continued.

6. **Uncontradicted Evidence: Question for Jury.** Where a prima-facie case is once made, it is improper for the court to declare that such prima-facie case is overcome as a matter of law by the introduction of mere oral evidence and facts *in pais* short of admissions, even though such evidence appears to be abundant to do so and remains uncontradicted. Keiley v. Knights of Father Matthew, 608.

7. **Reopening Case: Appellate Practice: Review.** The trial court may, in its discretion, before acting on a demurrer to plaintiff's evidence, reopen the case, at the request of plaintiff, and permit the introduction of material and relevant evidence which should have been introduced before plaintiff rested, and its discretion in this regard will not be disturbed, on appeal, unless manifestly abused. Drug Co. v. Grocer Co., 676.

TROVER. See **Conversion.**

TRUSTS. See **Precatory Trusts.**

1. **Wills: Construction: Active Trusts.** A devise of real estate to testator's son, "in trust for his children, to support and educate them," created an "active trust," in that it required the exercise of discretion by the trustee. Easton v. Demuth, 722.

2. **Active Trusts: Termination.** An active trust, which requires the exercise of discretion by the trustee, cannot be terminated at the will of the *cestui que trust.* Ib.

3. **Wills: Construction: Trusts: Beneficiaries.** The trust created by a devise of real estate to testator's son, "in trust for his children, to support and educate them," being an active trust, a child born to the son after testator's death would be a beneficiary. Ib.

4. **Same: Title and Duties of Trustee.** Under a devise of real estate to testator's son, "in trust for his children, to support and educate them," the son is only bound to provide reasonably for his children's support and education while they remain in his household, and if they leave his household, as by marrying, or their education is completed, he is not required to further provide for their support from the trust fund, nor is he bound to render an accounting of his expenditures or expenses connected with the fund; the real estate being given to him absolutely, subject only to the trust in the income derived from it, that such income should be used for the support and education of his children so long as they needed to be educated or continued as members of his family. Ib.

UNFAIR COMPETITION. See **Trade Marks and Trade Names.**

VARIANCE. See **Bills and Notes, 4; Contracts, 6; Corporations, 6; Negligence, 25; Pleading, 7, 9, 10; Principal and Agent, 6.**

VERDICTS. See **Appellate Practice, 4; Executors and Administrators, 1.**

WAIVER. See **Contracts, 11.**

WILLS.

1. **Trusts: Precatory: Construction.** The plaintiff sued to recover under a will on the ground that it created a precatory trust.

Digitized by Google

WILLS—Continued.

The property was bequeathed by will to her stepmother, and it was sold to the defendant, who was a brother of her deceased father. The bequest under which the precatory trust is claimed to have existed is as follows: "I give to my beloved wife, Ann C. Toler, all my property, real, personal and mixed, absolutely, knowing she will deal properly with my grandchild, Gertrude Snyder, and my son, Uriah Toler." *Held*, that these words of recommendation are an intimation of the wishes of the testator and not a command. Snyder v. Toler, 376.

2. **Construction.** A testator's meaning is to be found in his will alone. Ib.

3. **Precatory Trust.** A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust and especially no such trust will be implied when it clearly appears that the testator intended to give the devisee full discretion in the use of the property. Ib.

4. **Evidence: Oral Declarations: Construction.** In an action not to invalidate, but to construe a will, the oral declarations of the testator relating to the meaning of the instruments are not admissible. Ib.

5. **Construction: Trusts: Active Trusts.** A devise of real estate to testator's son, "in trust for his children, to support and educate them," created an "active trust" in that it required the exercise of discretion by the trustee. Easton v. Demuth, 722.

6. **Trusts: Active Trusts: Termination.** An active trust, which requires the exercise of discretion by the trustee, cannot be terminated at the will of the *cestui que trust*. Ib.

7. **Construction: Trusts: Beneficiaries.** The trust created by a devise of real estate to testator's son, "in trust for his children, to support and educate them," being an active trust, a child born to the son after testator's death would be a beneficiary. Ib.

8. **Same: Trusts: Title and Duties of Trustee.** Under a devise of real estate to testator's son, "in trust for his children, to support and educate them," the son is only bound to provide reasonably for his children's support and education while they remain in his household, and if they leave his household, as by marrying, or their education is completed, he is not required to further provide for their support from the trust fund, nor is he bound to render an accounting of his expenditures or expenses connected with the fund; the real estate being given to him absolutely, subject only to the trust in the income derived from it, that such income should be used for the support and education of his children so long as they needed to be educated or continued as members of his family. Ib.

WITNESSES. See **Principal and Agent, 1.**

WRIT OF ERROR CORAM NOBIS. See **Coram Nobis.**

1. **Setting Aside Judgment: Insanity: Pleading.** In a petition for a writ of error *coram nobis* to set aside a judgment rendered

Digitized by Google

WRIT OF ERROR CORAM NOBIS—Continued.

against him for assault and battery on a trial when he was insane, if it is alleged that he was insane at the time of the trial and judgment, it is not necessary to also allege that he was insane when he committed the assault. Gibson v. Pollock, 188.

2. **Same.** The office of a writ of error is to nullify judgments, proper on the face of the record, but improper by reason of facts not appearing by the record. And it may be invoked to annul a judgment taken against an insane person. Ib.

3. **Same: Pleading: Demurrer.** Where a petition for writ of error *coram nobis* alleges in general terms that the insane person "had a good and complete defense to said action" for assault and battery charged against him, it is sufficient after judgment, even though it be conceded to be bad if attacked by special demurrer for not alleging the facts constituting the defence. Ib.

4. **Same: Guardian: Pleading.** Where a petition for a writ of error *coram nobis*, is in the name of a guardian for an insane person, an objection to it on that ground is waived unless it be made a ground of special demurrer. Ib.

5. **Same: Trial: Evidence: Defence.** On trial of a writ of error *coram nobis* to set aside a judgment on the ground that it was rendered against an insane person for an alleged assault and battery, it is not necessary to prove facts showing that such person had a good defence to the action for assault and battery. Ib.

6. **Same: Evidence.** Evidence showing a person carried on imaginary conversations with the dead and with the angels; that he preached sermons to imaginery congregations through the night, is sufficient upon which to base a finding of insanity. Ib.

7. **Same: Limitations: Laches.** The Statute of Limitations does not run against a writ of error *coram nobis;* and though a judgment against an insane person, attacked by such writ, has been rendered more than five years, yet if only a period of eighteen months has passed since the appointment of a guardian before he brings his action, there is no laches. Ib.

"YARDS." See **Railroads, 9.**

Digitized by Google

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

Digitized by Google

contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———*, 188—, *executed on the ——— day of ———*, 188—;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

Digitized by Google

presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

Digitized by Google

RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by writ ten notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Digitized by Google

RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

Digitized by Google

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

Digitized by Google

Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions: provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ——— 190—, executed on the ——— day of ———, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstract above referred to and of any

Digitized by Google

objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

Digitized by Google

the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

Digitized by Google

Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk. No motion to certify any case to the Supreme Court will be entertained nor shall any such motion be filed by the clerk. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471; 177 Mo. App. 477.

Rule 24 is hereby amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

Digitized by Google

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

Digitized by Google

ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

Digitized by Google

states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

Digitized by Google

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove.

Digitized by Google

then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

Digitized by Google

days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2043, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

Digitized by Google

essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st. 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

Digitized by Google

from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Digitized by Google

RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3. 1913.

EX. 12/17/14

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google